Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

RICHARD A. VERNON, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION; DAVE PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, WARDEN, ISCI,

Petitioners,

v.

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN G. LANCE
Attorney General

MICHAEL A. HENDERSON
Deputy Attorney General
Division Chief, Criminal Division

PAUL R. PANTHER*
Deputy Attorney General
1299 North Orchard St., Suite 110
Boise, Idaho 83706-2266
(208) 658-2097

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. A plaintiff invoking the jurisdiction of a federal court must establish standing by demonstrating an actual or threatened injury. This case presents the question of whether a hypothetical, subjective "chill," independent of objective actual injury and without proof that a prisoner was actually deterred from exercising his First Amendment rights, is an injury sufficient to confer standing.

II. A prisoner claiming retaliation must show that he was punished in reprisal for exercising protected First Amendment rights. This case presents the issue of whether a prison law clerk's oral complaints about his supervisor's management of a prison law library is a constitutionally protected right so that interference with such an activity constitutes retaliation.

PARTIES

PETITIONERS

RICHARD A. VERNON, Director, Idaho Department of Correction. Director Vernon served as director of the Idaho Department of Correction in 1991 when this case was filed in the United States District Court for the District of Idaho.

JAMES C. SPALDING, Director, Idaho Department of Correction. Director Spalding was substituted for Director Vernon in his official capacity upon assuming the directorship of the Idaho Department of Correction in 1992.

Dave Paskett, Warden

Joe Klauser, Warden

RESPONDENTS

NOEL PUENTE GOMEZ

LEE MAZUR HAYS

BOB JONES

ALFREDO ROMAN

PATRICK HALL

MARQ BARTLETT

GREGORY JOSEPH NELSON

Intervenors ALAN LEE BRANDT, EUGENE STARR, RICHARD CARL, BOBBY ROWELL AND ALFREDO ESPARZA were dismissed from the underlying case in 1996 and did not participate in the appeal below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Idaho, on behalf of the named defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals App. at 1 is reported at 255 F.3d 1118 (9th Cir. 2001). The opinion of the District Court, App. at 34, is unreported.

JURISDICTION

The Court of Appeals entered its judgment on July 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides, in relevant part,

> § 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish . . . .
>
> § 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and

treaties made, or which shall be made, under their authority . . . .

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 United States Code § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's official capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This Petition arises out of a decision by a United States Magistrate, affirmed by the Ninth Circuit Court of Appeals. Those courts held that a prisoner alleging retaliation for exercising his First Amendment rights is entitled to relief even though he failed to show both that he suffered an actual injury and that the retaliation was motivated by the exercise of a protected First Amendment right. This decision further widens an already deep split between federal circuits on the subject of prison retaliation. It accords prisoners more expansive rights than free citizens, who must demonstrate actual injury if they bring retaliation claims. If uncorrected, this decision will impede prison officials undertaking the already complex task of administering prisons and will involve federal courts in the minutia of state prison management. This case merits review because it presents this Court with the opportunity to reconcile conflicts between the circuits and this Court over both the extent to which a prisoner must demonstrate actual injury in order to establish standing and the extent to which the First Amendment rights of prisoners are protected. It offers the Court the occasion to prevent the needless entanglement of federal courts in the daily affairs of state prisons and to avoid the waste of judicial resources that is likely to result from this decision.

This case began in 1991 as a class action lawsuit by prisoners in the custody of the Idaho Department of Correction at the Idaho Maximum Security Institution and the Idaho State Correctional Institution in Boise, Idaho. The prisoners alleged that prison staff engaged in a practice of retaliation against them for their exercise of

First Amendment rights. These claims were tried in 1998 before a United States Magistrate. After a nineteen-day trial involving dozens of claims, the Magistrate held that the prisoners failed to prove they were entitled to class-wide relief. Instead, the Magistrate entered injunctive relief for only six prisoners. App. at 81. Petitioners appealed several issues to the Ninth Circuit, which affirmed. App. at 84, 1.

For purposes of this Petition, the relevant issue appealed was the Magistrate's grant of injunctive relief to prisoner Bob Jones ("Jones"). Jones worked in the Idaho State Correctional Institution law library in 1997 under the supervision of Correctional Library Supervisor Michele Nelson ("Nelson"). Jones confronted Nelson about what he perceived as defects in her management of the law library, such as absences, failure to keep appointments, rule changes, and policy violations. The Magistrate found that Nelson wanted Jones transferred because she felt she was in a difficult position due to a Deputy Attorney General's request that Jones convince another prisoner to accept a settlement offer. She was also afraid of Jones and felt threatened by him because she had previously fired him from another law clerk job. But, the Magistrate also held that these reasons were "pretextual" and concluded that Nelson wanted Jones transferred because of his complaints about her. App. at 54-57. The Magistrate identified instances in which Nelson sought to "improperly influence" a transfer of Jones.

As to the first instance, the Magistrate found that sometime before July 1997, Nelson asked Deputy Warden Gary Barrier ("Barrier") to transfer Jones to the Idaho

Correctional Institution – Orofino ("Orofino"). Nelson told Correctional Officer Al Race ("Race") that she "knew someone in the transfer department" and "could have Jones transferred." The Magistrate did not find that there was ever an actual plan to transfer Jones to Orofino or that Nelson actually influenced anyone to consider transferring him. Jones was not transferred and did not find out about Nelson's actions until Race told him about them. App. at 55-56.

As to the second instance, the Magistrate found that in July 1997, Jones was given short notice to prepare for a transfer to Louisiana as part of a larger move of Idaho prisoners to that state. While he was readied for transport, Jones spoke to Barrier and threatened to sue him. Jones' transfer was cancelled. App. at 92-93. He confronted Nelson the next day and demanded an explanation from her, but she denied being involved in the Louisiana transfer. App. at 89-90. The Magistrate identified no actions by which Nelson attempted to influence a decision to transfer Jones to Louisiana.

The Magistrate found that Jones resigned as a law clerk in August 1997 because he decided that working under Nelson's supervision was "detrimental." App. at 57. Jones testified that he resigned because he did not like being under Nelson's supervision, and because he was preparing to sue her and did not think it would be fair to her if he continued working for her as that action was in progress. Jones did sue Nelson in an action that was pending at the time of trial. App. at 91-94.

Idaho State Correctional Institution Warden Joe Klauser ("Klauser") testified about the reasons for the

Louisiana transfer which, for Jones, was cancelled. According to Klauser, his institution's prisoner population was capped by a court order. The Idaho Department of Correction sought to have the court modify that cap, but was unsuccessful. App. at 95-97, 99-100. As a result, it was compelled to send prisoners out of state. App. at 102. Idaho prisoners were moved to Texas, Minnesota and Louisiana. The vast majority of prisoners sent to Louisiana were not volunteers. App. at 106-107.

Pat Ogden coordinated the selection of prisoners for the Louisiana move for the Idaho Department of Correction. She testified that the Department's initial criteria called for prisoners who were medium or minimum custody, were at least 24 months away from a parole hearing or full term release, had no medical or mental problems, had no imminent court appearances in Idaho, and had no detainer issues. As the transfers neared, officials had difficulty finding sufficient numbers of qualified prisoners. The 24-month period was reduced to 18 months and then to 12 months because there were not enough qualified candidates. App. at 109-111, 115-117. No evidence was introduced showing that Jones did not meet these criteria.

The transfer plans called for moving 300 prisoners to Louisiana. Prison officials attempted to find 350 qualified prisoners to ensure there would be a number of alternates in case some were removed from the list. App. at 111. The transfer took place in two groups, the second of which occurred in July 1997, when Jones' transfer was cancelled, and involved prisoners from the Idaho State Correctional Institution where he was housed. App. at 113-114. By that time, there were fewer than five alternates total, App. at

111, and only one alternate at the Idaho State Correctional Institution. App. at 118.

The Idaho Department of Correction had a formal grievance process, used at Jones' prison, by which prisoners could submit written grievances to the staff person involved. If they failed to get a satisfactory result, prisoners could submit the same grievance to a unit sergeant and eventually to the Warden. App. at 103-105. Jones admitted that he never used this grievance procedure to communicate with Nelson or to others about her actions. App. at 94.

The Magistrate entered injunctive relief for Jones and several other inmates. Despite the lack of evidence that Nelson ever actually influenced any decision regarding a possible transfer of Jones, the injunction prohibited Petitioners from allowing individual officers to influence transfer decisions involving Jones based on his exercise of federally guaranteed rights. Despite the lack of evidence that the attempted transfers related to Jones actually accessing the courts, the injunction further prohibited any consideration of his activities in accessing the courts as a factor in his transfer. Although Warden Klauser testified that subjective criteria sometimes form the basis of a transfer decision, the injunction required that any transfer of Jones be based upon a transfer list that "has independently been created based upon purely objective criteria" and prohibited the use of any "subjective criteria" in deciding to add him to a transfer list he did not otherwise qualify for based on objective criteria. App. at 81-82.

When the Appellate Court examined Jones' claim, it found, in contrast to the Magistrate and the record, that Jones quit his law library job "in the face of repeated threats of transfer because of his complaint" and that "It is the chilling effect that forced Jones to quit his job . . . . " App. at 15. The Appellate Court held that "a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights." 255 F.3d at 1127, *citing Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997), *cert. denied, Pearson v. Hines*, 524 U.S. 936 (1998) and *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000). App. at 15.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S HOLDING THAT A PRISON RETALIATION CLAIM MAY BE BASED ON A SUBJECTIVE "CHILL" WITHOUT ACTUAL INJURY CONFLICTS WITH PRIOR HOLDINGS OF THIS COURT AND OTHER FEDERAL CIRCUITS AND ACCORDS PRISONERS GREATER RIGHTS THAN FREE CITIZENS.

Standing is a bedrock requirement of federal jurisdiction, yet the Appellate Court ignored that principle and this Court's long standing precedent. It also widened an existing split between the various Federal Circuits.

A. THE NINTH CIRCUIT REQUIRES NO ACTUAL INJURY IN THE PRISON RETALIATION CONTEXT.

The Appellate Court relied on *Hines v. Gomez, supra*, a Ninth Circuit case in which a prisoner claimed he

received a retaliatory disciplinary accusation. *Hines* held that the prisoner's failure to allege more than only a chill of his First Amendment rights did not defeat his claim. The court did not require Hines to prove he actually *was* chilled and it specifically rejected the suggestion that he be required to show a more substantial injury. Instead, it found that the retaliatory accusation and an inferred chilling effect on Hines' First Amendment rights was, without more, sufficient injury. *Id.*, 108 F.3d at 269.

Hines followed other Ninth Circuit retaliation cases requiring no actual injury. Since *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), a retaliation plaintiff has borne a two-pronged burden of proof in the Ninth Circuit. He must prove (1) that he was engaged in activity protected by the First Amendment and (2) that the state took action in response that did not advance legitimate penological goals. *Rizzo*, 778 F.2d at 532. *See Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994); *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995).

Rizzo and its successors require no injury; the action of the defendant, without more than a hypothetical, subjective chill is sufficient. In the instant case, the Appellate Court went even further, finding retaliation where a low level prison employee merely *intended* to retaliate but was overruled by her superior. The Appellate Court found the *intended* retaliation a sufficient injury in itself, even though Jones suffered no actual injury. This case merits review because the Appellate Court's decision conflicts with prior decisions of this Court and other federal circuits holding that an actual injury is a necessary prerequisite for standing.

B. THE APPELLATE COURT'S DECISION IGNORED PRIOR RULINGS OF THIS COURT ADDRESSING STANDING.

There is no legal principle more foundational than standing. Time and again, this Court has required that a plaintiff seeking to invoke the jurisdiction of federal courts under Article III of the United States Constitution establish standing by showing that he " 'has sustained or is in immediate danger of sustaining some direct injury' as the result of the challenged statute or official conduct" which is "both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This requirement of "actual injury" is not satisfied by an " 'abstract injury in nonobservance of the constitution asserted by . . . citizens,' " *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 482 (1982), nor by a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). The principle that a plaintiff must suffer some recognizable actual injury means that he must have suffered an actual detriment or loss.

The Appellate Court's decision is inconsistent with this precedent and two recent cases in which this Court addressed the type of injury necessary to state a constitutional claim in the prison context. In *Sandin v. Conner*, 515 U.S. 472 (1995), this Court held that a prisoner cannot state a due process claim arising from a prison disciplinary proceeding unless he suffers a sufficient injury in the form of a deprivation that is atypical and significant in the context of ordinary prison life. In *Lewis v. Casey*, 518

U.S. 343, 349-350 (1996), this Court held that hypothetical inadequacies in a prison's legal access system are insufficient to confer standing. Instead, a prisoner must show that he personally suffered an actual injury in the form of loss or interference with a non-frivolous claim involving his conviction, sentence or conditions of confinement. Both decisions reversed the Ninth Circuit, both required some actual, concrete injury and both rejected claims based on hypothetical or de minimis injury.

This Court has rejected the notion that a "chill" is a sufficient injury to support standing. In *United States v. Ramsey*, 431 U.S. 606 (1977), the defendants argued that the opening of incoming international mail by customs officers violated the First Amendment and impermissibly chilled the exercise of free speech. This Court held that it did not have to decide this constitutional issue because the plaintiffs failed to show a sufficient injury, finding that "Any 'chill' that might exist under these circumstances may fairly be considered not only 'minimal' . . . but also wholly subjective." 431 U.S. at 624.

Similarly, in *Laird v. Tatum*, 408 U.S. 1 (1972), this Court held that:

> Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.

408 U.S. at 13-14.

In contrast, the Appellate Court affirmed injunctive relief for Jones based on a subjective, hypothetical chill

supported by no evidence that he suffered any adversity or that he curtailed his First Amendment activity. His conduct received the tacit approval of the prison administration when Deputy Warden Barrier overruled Nelson's attempts to transfer him. He resigned his job only because he didn't like being supervised by Nelson and he planned to sue her. Jones' lawsuit against Nelson was pending during trial. The Appellate Court's decision cannot be reconciled with this Court's requirement that a plaintiff must suffer an actual, rather than subjective, hypothetical or de minimis injury in order to establish standing.

C. THE APPELLATE COURT'S DECISION CONFLICTS WITH OTHER CIRCUITS WHICH HAVE APPLIED AN OBJECTIVE TEST FOR INJURY IN THE PRISON RETALIATION CONTEXT.

The Appellate Court's decision illuminates a conflict between the Ninth Circuit and those federal circuits requiring an objective, actual injury. The Second, Third, Sixth, and D.C. Circuits have applied an objective test to determine whether a prisoner alleging retaliation has suffered an injury that rises to a constitutional level. This test requires that a court examine the facts of the case before it and determine whether, under those facts, the retaliatory action would deter a similarly situated person of ordinary firmness from exercising his constitutional rights. If the injury fails to rise to that level, a plaintiff cannot state a retaliation claim.

The Second Circuit applied this "ordinary firmness" test in *Dawes v. Walker*, 239 F.3d 489 (2nd Cir. 2001). Recognizing that prison life involves a degree of adversity that ordinary citizens are not expected to endure and which is "an ever-present concomitant of prison life," *Dawes* held that in prison, "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation . . . . Otherwise, the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection . . . " (citations omitted). *Id.* at 491, 493. *See also, Davidson v. Chestnut*, 193 F.3d 144, 150-51 (2nd Cir. 1999) (whether deterrent effect of claimed retaliation reaches threshold of actionability is a question of fact).

The Third Circuit has ruled that a prisoner claiming retaliation must show that he suffered an adverse action "sufficient to deter a person of ordinary firmness from exercising his [constitutional rights]." *Rauser v. Horn*, 241 F.3d 330, 333 (3rd Cir. 2001), *citing Allah v. Seiverling*, 229 F.3d 220, 225 (3rd Cir. 2000). *Allah* illustrates the objective nature of the ordinary firmness inquiry. There, a prisoner alleged retaliatory placement in administrative segregation. The court found that segregation alone is insufficient to establish the necessary injury since "it is possible in some cases placement in administrative segregation would not deter a prisoner of ordinary firmness from exercising his or her First Amendment rights," and "whether a prisoner-plaintiff has met that prong of his or her retaliation claim will depend on the facts of the particular case." 229 F.3d at 222, 225.

The Sixth Circuit has required that a plaintiff claiming retaliation prove that the defendant took an adverse action that would deter a person of ordinary firmness from continuing to engage in constitutionally-protected conduct. *Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001); *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000); *Thaddeus X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999). *Thaddeus X* deserves attention because it is widely cited and includes a valuable discussion of the ordinary firmness standard.

The *Thaddeus X* court found that the "adverse action" element of a retaliation claim originated in employment law. 175 F.3d at 396. To determine whether the actions of prison officials were sufficiently adverse to rise to a constitutional level, the *Thaddeus X* court adopted the standard set forth in an employment case, *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). In *Bart*, a retaliation suit by a public employee, the court held that an adverse action was one which would "deter a person of ordinary firmness" from exercising a right at stake. *Bart*, 677 F.2d at 625, *cited at* 175 F.3d 396. According to *Bart*, " '[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . . ' " *Bart*, 677 F.2d at 625, *cited at* 175 F.3d 397. *Thaddeus X* noted that the same standard was approved in *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996), *reversed on other grounds*, 523 U.S. 574 (1998), and left undisturbed by the Supreme Court upon appeal of that case. 175 F.3d at 397.

The *Thaddeus X* court observed that the definition of an adverse action is not static. Recalling *Bart* and recognizing the uniqueness of prison life, the court held that "Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse" and that the ordinary firmness test was "an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening the most trivial of actions from constitutional cognizance." *Id.* at 398. The court concluded that "Retaliation against a prisoner is actionable if it is capable of deterring a person of ordinary firmness from exercising his or her right to access the courts." *Id.*

Since *Thaddeus X*, the Sixth Circuit has applied the ordinary firmness test in a number of cases directly in conflict with the Appellate Court's decision here. The Sixth Circuit has held that the transfer of a prisoner from the general population of one prison to that of another is "one of the ordinary incidents of prison life" which "would not deter a person of ordinary firmness from exercising his First Amendment rights." *Herron v. Campbell*, 198 F.3d 245, p. 1 (6th Cir. 1999) (unpublished). *See Mandela v. Campbell*, 181 F.3d 102, p. 3 (6th Cir. 1999) (unpublished), *Dunham-Bey v. Holden*, 198 F.3d 244 (6th Cir. 1999) (unpublished), *Goss v. Myers*, 208 F.3d 213, p. 2 (6th Cir. 2000) (unpublished), and *Goddard v. Kentucky Dept. of Corrections*, 205 F.3d 1340, p. 3 (6th Cir. 2000) (unpublished). The Sixth Circuit has also held that a prison may transfer a prisoner in order to gain a respite from his grievances and litigation, where the transfer is

supported by the legitimate purposes of reducing prisoner-staff tensions while allowing the prisoner to pursue redress of grievances. *Ward v. Dyke*, 58 F.3d 271, 274-75 (6th Cir. 1995).

As noted in *Thaddeus X*, the District of Columbia Circuit approved the ordinary firmness test, holding that "some non-de minimis showing of injury is necessary" and that a "sensible standard" for measuring such claims is "whether an official's acts would chill or silence a 'person of ordinary firmness' from further First Amendment Activities." *Crawford-El v. Britton, supra*, 93 F.3d at 826.

While not applying the ordinary firmness test, the Fourth Circuit has required that a prisoner show an "adverse impact" resulting from her exercise of protected rights. *American Civil Liberties Union of Maryland v. Wicomico County, Maryland*, 999 F.2d 780, 785 (4th Cir. 1993); *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), *cert. denied*, 514 U.S. 1022 (1995).

The Fifth Circuit has required that a prisoner show an "adverse act" by a defendant. *Jones v. Greninger*, 188 F.3d 322, 324-25 (5th Cir. 1999); *Clarke v. Stadler*, 121 F.3d 222, 231 (5th Cir. 1997); *Johnson v. Rodriguez*, 110 F.3d 299, 310, 313-314 (5th Cir. 1997) (prisoner's subjective assessment that a chill took place was insufficient absent evidence that he was deterred from writ-writing activity).

The Seventh and Tenth Circuits have not addressed the injury issue extensively.

On the other hand, the First, Eighth, and Eleventh Circuits largely agree with the Ninth Circuit that no

actual injury is required. *McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979) (transfer to nearby prison of similar conditions was sufficient injury); *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994) (no independent injury required); *Thomas v. Evans*, 880 F.2d 1235, 1242 (11th Cir. 1989) (retaliatory act need not constitute separate constitutional violation).

This case merits review because it offers this Court the opportunity to end the conflict illustrated above and to provide a uniform rule for lower federal courts dealing with prison retaliation cases. Defendants urge the Court to grant certiorari and end that conflict by adopting the ordinary firmness test.

D. THE NINTH CIRCUIT'S DECISION ACCORDS PRISONERS GREATER RIGHTS THAN FREE CITIZENS.

In contrast to established law and common sense, the Appellate Court's decision accords greater rights to prisoners, who need suffer no injury in order to obtain relief, than to free citizens who must establish standing by demonstrating an actual injury. And, the Appellate Court's decision is inconsistent with non-prison retaliation law in other circuits and even with non-prison retaliation law in the Ninth Circuit itself.

In the non-prison context, the Ninth Circuit has, in two recent cases, applied the ordinary firmness test to hold that threats of legal sanctions or other means of coercion, persuasion, and intimidation violate the First Amendment only where they "would chill or silence a person of ordinary firmness from future First Amendment activities." *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000),

citing Mendocino Environmental Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999). By applying the ordinary firmness test in *White* and *Mendocino*, the Ninth Circuit required that free citizens endure more adversity than prisoners, who need only allege a subjective chill to support a retaliation claim. This ignores the long-standing recognition that prison life necessarily entails the constriction of a prisoner's rights and conveniences.

The First, Third, Fifth, Sixth, Seventh, and Tenth Circuits have also applied the ordinary firmness standard in retaliation cases brought by free citizens. *See Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217-18 (1st Cir. 1989) (employment); *Denovellis v. Shalala*, 135 F.3d 58, 64 (1st Cir. 1998) (employment) (holding that a free citizen cannot rely on a hypothetical chilling effect, which is "plainly inadequate"); *Suppan v. Dadonna*, 203 F.3d 228, 234-235 (3rd Cir. 2000) (employment); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (employment); *Charvat v. Eastern Ohio Regional Wastewater Authority*, 246 F.3d 607, 616 (6th Cir. 2001) (employment); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (suit against sheriff by crime victims); *Bart v. Telford, supra* (employment); *Coady v. Steil*, 187 F.3d 727, 734 (7th Cir. 1999) (employment); *Smith v. Plati*, 258 F.3d 1167 (10th Cir. 2001) (publishing).

Circuits which have not applied the ordinary firmness test in non-prison cases have required more injury than a mere "chill." *See Connell v. Signoraci*, 153 F.3d 74, 79 (2nd Cir. 1988) (plaintiff stated claim where alleged retaliation hurt her business); *Singer v. Fulton County Sheriff*, 63 F.3d 110 (2nd Cir. 1995) (no chill where plaintiff publisher kept publishing despite retaliation); *Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (4th Cir. 2000) (plaintiff

must show defendant's acts had an adverse impact on his constitutional rights which is "more than *de minimis* or trivial;" whether that impact is sufficient is a "fact intensive inquiry"); *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990) (plaintiff must be deprived of a "valuable benefit"); *Ross v. Douglas County, Nebraska*, 234 F.3d 391, 395 (8th Cir. 2000) (employer's adverse action must cause employee a "materially significant disadvantage" instead of mere inconvenience).

The Appellate Court has it backwards. Prison restricts the rights of prisoners; it does not accord them greater rights than free citizens. *Shaw v. Murphy*, 532 U.S. 223 (2001). Yet, according to the Appellate Court, prisoners like Jones, who suffered an unproven, subjective, hypothetical chill bear a lesser burden than free citizens, who must prove that they suffered an actual injury which would chill a person of ordinary firmness or deter a "reasonably hardy" person, or have an "adverse impact" that was more than de minimis or trivial, or create a materially significant disadvantage. This case presents the Court with the opportunity to remedy this anomaly and to provide consistency and reason to the law of retaliation as applied between the prison and non-prison contexts.

II. THE APPELLATE COURT'S DECISION THAT A PRISONER HAS A PROTECTED CONSTITUTIONAL RIGHT TO MAKE ORAL COMPLAINTS ABOUT THE MANAGEMENT OF A PRISON LAW LIBRARY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS AND FAILS TO APPLY THE APPROPRIATE TEST.

The Magistrate and Appellate Court held that Jones was exercising a protected First Amendment right that prompted retaliation against him. The Magistrate held that

> . . . complaints regarding the operation of a prison law library are unique in the prison context for purposes of this instant action. The complaints comprise speech which is designed to orally grieve potential impermissible intrusions upon the right to access the court system held by the individual inmates . . . . Inasmuch as Plaintiff Jones was attempting to raise concerns regarding Nelson's operation of the law library and how it was affecting the inmates' right to access the courts, his speech was protected . . . .

App. at 57. In agreement, the Appellate Court held that Jones' "complaints – protected by the First Amendment – related to 'how [the law library] was affecting the inmates' right to access the courts.' " App. at 15. In fact, Jones suffered no retaliation because retaliation requires the exercise of a protected First Amendment right. Jones was not exercising such a right. The Appellate Court's decision is contrary to prior decisions of this Court and it highlights a conflict between federal circuits on this issue. However, even if his speech was protected, the Appellate

Court erred in not applying the deferential *Turner v. Safley* test to it.

A. THE APPELLATE COURT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS, UNDER WHICH JONES' SPEECH WAS NOT PROTECTED.

After this case was tried and the appeal briefed, this Court decided *Shaw v. Murphy, supra*. *Shaw* clarified that prison speech regarding legal issues is not entitled to greater protection than other types of speech by prisoners. Because *Shaw* was not decided until after the appeal briefs in this action were filed, it could not have been raised below. However, *Shaw* was decided before entry of the Appellate Court's decision and was available to that court.

In *Shaw*, this Court faced the question of whether an inmate possesses a right to provide legal assistance to other inmates that affords him greater protections than those attached to other forms of prison speech. The Court recognized that federal circuits have taken differing positions on the issue of whether a prisoner's right to provide legal assistance to another prisoner was constitutionally protected. The Court ended this conflict, holding that "there is no such special right" to provide legal assistance that enhances the protection offered to prisoners otherwise available under *Turner v. Safley*, 482 U.S. 78 (1987). *Shaw*, 121 S.Ct at 1478-79.

The *Shaw* decision was based on a recognition of the realities of prison life and management. The Court

observed that the rights of prisoners are "more limited in scope than the constitutional rights held by individuals in society at large," and that in the First Amendment context "some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system,' " and reiterated its practice of deference to the judgments of prison officials. 121 S.Ct. at 1479. The Court then reaffirmed that it had adopted "a unitary, deferential standard for reviewing prisoners' constitutional claims" in *Turner*, under which there is no "special protection granted to particular kinds of speech based upon its content." *Id.* at 1479-80. Such protection for legal advice would "undermine prison officials' ability to address the 'complex and intractable' problems of prison administration." *Id.* at 1480, *citing Turner, supra* at 84. This Court held that "the proper constitutional test" for inmate speech involving legal assistance is "the one we set forth in *Turner*." *Shaw* at 1480.

The circuits are unanimous in requiring that a prisoner bringing a retaliation claim show that the retaliation came in response to the exercise of a protected constitutional right. *McDonald v. Hall*, 610 F.2d 16, 18, 19 (1st Cir. 1979); *Dawes v. Walker, supra*, 239 F.3d at 491-492 (2nd Cir.); *Rauser v. Horn, supra*, 241 F.3d at 333 (3rd Cir.); *Adams v. Rice, supra*, 40 F.3d at 75 (4th Cir.); *Jones v. Greninger, supra*, 188 F.3d at 324-325 (5th Cir.); *Clarke v. Stadler, supra*, 121 F.3d at 231 (5th Cir.); *Smith v. Campbell, supra*, 250 F.3d at 1037 (6th Cir.); *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. 1985); *Rouse v. Benson*, 193 F.3d 936, 940 (8th Cir. 1999); *Pratt v. Rowland, supra*, 65 F.3d at 805 (9th Cir.); *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir.

1998); *Thomas v. Evans, supra,* 880 F.2d at 1342 (11th Cir.); *Crawford-El v. Britton, supra,* 93 F.3d at 825. However, they are not unanimous in their views of which types of activities are constitutionally protected.

A number of circuits, in agreement with *Shaw,* have held that a provision of legal assistance to other prisoners is not a protected right for retaliation purposes. *Johnson v. Rodriquez, supra,* 110 F.3d at 311 (5th Cir.); *Tighe v. Wall,* 100 F.3d 41, 42-43 (5th Cir. 1996); *Peterson v. Shanks, supra,* 149 F.3d at 1144 (10th Cir.); *Smith v. Maschner,* 899 F.2d 940, 950 (10th Cir. 1990). Some circuits have held that prisoners have no constitutional right to participate in a prison grievance procedure. *Adams v. Rice, supra,* 40 F.3d at 75 (4th Cir.); *Smith v. Campbell, supra,* 250 F.3d at 1037 (6th Cir.); *Flick v. Alba,* 932 F.2d 728, 729 (8th Cir. 1991) (per curiam). Others, in agreement with this court in *Lewis v. Casey, supra,* have held that there is no right to an unlimited use of a prison law library. *Jones v. Greninger, supra,* 188 F.3d at 325 (5th Cir.); *White v. Gregory,* 87 F.3d 429 (10th Cir. 1996).

In the instant case, Jones did not testify, nor did the Magistrate find, that his personal verbal criticism of Nelson, his supervisor in the law library, involved his own cases or any cases of individual prisoners. Rather, Jones' speech dealt with Nelson's management style and her perceived shortcomings. There is no evidence that Jones' speech was prompted by any danger of a loss of access to courts by any particular prisoner or that his speech had any effect at all on anyone. Jones' speech was entitled to no constitutional protection. The Appellate Court's decision conflicts with *Shaw* and other cases holding that a prisoner has no right to give legal assistance to

other prisoners. If there is no right to give legal assistance to other prisoners, then Jones had no protected right to make verbal complaints to Nelson about how she managed the law library where no direct assistance to any inmate is at stake. And if, as the Fourth, Sixth, and Eighth Circuits have held, there is no right to participate in a grievance process, there is even less right to make informal oral complaints such as those made by Jones to Nelson. If, as *Lewis* affirmed, there is no right to a law library to begin with, there can hardly be a protected right for a prisoner law clerk to complain to his supervisor about the way she managed the law library, absent evidence that a specific inmate was suffering actual injury because of the actions Jones complained about.

B. IF JONES' SPEECH WAS PROTECTED, THE APPELLATE COURT ERRED IN NOT APPLYING THE *TURNER* STANDARD TO EVALUATE THE ALLEGED RETALIATORY ACT.

Jones was not exercising a protected right when he complained to Nelson about her job performance. However, even if he was, under *Shaw* both the Magistrate and Appellate Court erred by failing to apply the deferential *Turner* test.

Nelson testified that she feared Jones, felt threatened by him and was uncomfortable with his being an agent of the Attorney General's Office while employed as a law clerk. Prison officials testified about the reasons for the Louisiana transfer of which Jones was to have been a part and the criteria for selecting prisoners to be transferred. Applying *Turner* would have required the Magistrate and

Appellate Court to determine (1) whether Nelson's efforts, if any, served a legitimate penological purpose and whether the Louisiana transfer and the selection process for that transfer served such a purpose, (2) whether there were alternate means for Jones to exercise his First Amendment rights, (3) the impact of accommodation of his rights on guards, other inmates and prison resources generally, and (4) the absence of ready alternatives available to Nelson or the Department for achieving their objectives. *Shaw*, 121 S.Ct. at 1479, *citing Turner*, 482 U.S. at 89-90.

Instead of applying *Turner*, the Magistrate and Appellate Court simply concluded that Jones' speech was entitled to special protections that outweighed the evidence in the record that a transfer was justified. The Magistrate and Appellate Court failed to exercise appropriate deference and chose instead to substitute their own judgment for prison officials, ignoring the evidence to the contrary. They erred in doing so. This case merits review because the Appellate Court's failure to defer to prison authorities and to recognize their unique expertise to conduct the business of their institutions, invites micromanagement and second-guessing by federal courts that will emesh federal courts in state prison systems.

CONCLUSION

The decision of the Appellate Court is in conflict with prior decisions of both this Court and of courts in other federal circuits. This case presents the opportunity for the Court to clarify the law, make it uniform and give much-

needed guidance to lower courts likely to face similar issues again and again.

Jones lacked standing. Although he demonstrated no adversity at all and never halted his First Amendment activity, the Appellate Court held that he had suffered a chill that even the Magistrate declined to find and that Jones himself never recognized. In contrast to the Ninth Circuit, the Second, Third, Sixth, and D.C. Circuits have applied an objective firmness test which requires a prison retaliation plaintiff to demonstrate a demonstrable actual injury. Like this Court in *Sandin*, the objective firmness test focuses on the result of the action and how it impacts the prisoner in the prison context. Like this Court in *Lewis*, the objective firmness test requires that a prisoner suffer an actual, rather than hypothetical, injury before prison officials must defend their actions in court. Like this Court in *Ramsey*, the objective firmness test requires more than a de minimis, "wholly subjective" chill. Defendants urge this Court to grant a writ of certiorari to consider adopting the ordinary firmness test as an objective measure of injury, and thus standing, in prison retaliation cases.

Jones' oral complaints to Nelson about her perceived shortcomings as a law librarian were not constitutionally protected speech. The Magistrate and Appellate Court erred in holding that his speech was protected, and the Appellate Court's decision is in conflict with this Court's *Shaw* decision and decisions of other federal circuits. Even if the speech was protected, the Appellate Court should have applied the deferential four-part test set forth in *Turner v. Safley* to evaluate the reasons offered for Jones' transfers which, in any event, never took place.

According to that test, and in light of the record, the Appellate Court should have deferred to the judgment of prison officials rather than substituting their own judgment.

This case also merits review because of what it is likely to lead to if uncorrected.

This case offers the Court the opportunity to prevent the unnecessary entanglement of federal courts in the affairs of state prisons, as exemplified by Jones' cancelled Louisiana transfer. It is the job of prison officials, and not courts, to run prisons. The Appellate Court's second-guessing of the reasons offered for an everyday decision such as a prisoner transfer in the face of legitimate penological reasons for that transfer is an example of what happens when a court steps into the shoes of prison manager.

This case also offers the Court the opportunity to prevent prisoners who have suffered no injury from bringing baseless retaliation claims which are no more than "reverse retaliation" against prison officials. Under the Appellate Court's reasoning, a prisoner may sue prison officials for simply thinking about transferring him. A prisoner who is given a disciplinary citation has standing to sue the officer who issued the citation, even if he is not punished. Similarly, prisoners could bring retaliation claims against officials who did no more than consider upgrading their custody status, think about placing them in administrative segregation even if they were never actually segregated, or recommend that their parole be denied even if they were actually paroled.

Because of the threat of such suits, prison management will become an even more difficult proposition than it already is. The phrase "Don't even think about it" will acquire an entirely new meaning when prisoners realize how to apply the Ninth Circuit's new expansion of their rights. Prisoners will seek to protect against transfer, termination or discipline merely by complaining about the way a prison employee does his job and claiming to be threatened with retaliation

Finally, this case has furthered an already anomalous application of retaliation law. As noted above, in the Ninth Circuit it is more difficult for a free citizen to bring a retaliation claim than it is for a prisoner to bring the same claim. The free citizen must have suffered an injury; the prisoner need not have done so.

The great irony of this case is that it is one in which the system worked. Nothing happened to Jones, and his actions received the tacit endorsement of the deputy warden who overruled Nelson's attempts to transfer him. Nothing needed to be corrected. Yet Jones obtained an injunction that constrains the way prison officials must treat him in the future.

For all of the above reasons, Petitioners respectfully urge the Court to grant certiorari in order to review this case.

Respectfully submitted,

ALAN G. LANCE
Attorney General

MICHAEL A. HENDERSON
Deputy Attorney General
Division Chief, Criminal Division

PAUL R. PANTHER*
Deputy Attorney General
1299 North Orchard St., Suite 110
Boise, Idaho 83706-2266
(208) 658-2097

**Counsel of Record*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON, *Plaintiffs-Appellees,* v. RICHARD A. VERNON, Director, IDAHO DEPARTMENT OF CORRECTIONS; DAVE PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, Warden, ISCI; *Defendants-Appellants,* ALAN LEE BRANDT, *Defendant-Intervenor-Appellant,* v. EUGENE STARR; RICHARD CARL; BOBBY ROWELL; ALREDO ESPARZA, *Plaintiffs-Intervenors-Appellees.*	No. 99-35930 D.C. No. CV-91-00299-LMB OPINION (Filed July 10, 2001)

Appeal from the United States District Court
for the District of Idaho
Larry M. Boyle, Magistrate, Presiding

Argued and Submitted
February 14, 2001 – Seattle, Washington

Before: M. Margaret McKeown, Kim McLane Wardlaw, and Ronald M. Gould, Circuit Judges.

Opinion by Judge McKeown;
Concurrence by Judge Gould

COUNSEL

Timothy D. Wilson, Office of Attorney General, State of Idaho, Boise, Idaho for the defendants-appellants.

Stephen L. Pevar (argued), American Civil Liberties Union, Denver, Colorado; Margaret Winter, Donna H. Lee, and Eric Balaban, National Prison Project of the ACLU Foundation Inc., Washington, D.C.; Howard Belodoff, Boise, Idaho, for the plaintiffs-appellees.

OPINION

McKEOWN, Circuit Judge:

This case exemplifies antagonism toward prisoner litigation at the cost of constitutional rights and legal ethics. While all may be fair in war,[1] such is not the case in the judicial arena – the courtroom is not a battlefield. After a nineteen-day trial, the district court, Magistrate Judge Boyle presiding, found that the Idaho Department of Corrections, two of its penal institutions, and several officials (collectively the "Department") retaliated against inmates who filed lawsuits or availed themselves of

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[1] "All's fair in love and war." Francis Smedly, Frank Fairleigh (1850); "The rules of fair play do not apply in love and war." John Lyly, Euphues (1578).

grievance procedures. The conclusion that the Department violated the inmates' constitutional rights is not challenged on appeal. Rather, we are called upon to address whether, for purposes of jurisdiction, the parties consented to appear before the magistrate judge; whether the grant of injunctive relief was an appropriate remedy for the retaliation; and whether a court may impose sanctions under its inherent power and 28 U.S.C. § 1927 when counsel[2] for the state improperly acquired and used privileged and confidential litigation materials belonging to inmate litigants. We answer these questions in the affirmative, and we affirm.

Background

Factual Background.[3]

The Department, like many prison systems, employs inmates as law clerks in its prison libraries to help other inmates file legal papers, such as habeas corpus petitions or civil rights claims, and to prepare grievances or other administrative complaints. Inmates enjoy access to the law libraries, and the assistance of the inmate law clerks, as a guarantee of their due process right to access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that " 'the fundamental constitutional right of access

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[2] Counsel representing the Department on appeal was not involved in the misconduct or sanctions at issue in this appeal.

[3] This factual summary is drawn from the district court's extensive findings of fact, which are not challenged on appeal, and which accompany the Memorandum Decision and Order and the Memorandum Decision and Order Relating to Plaintiffs' Motion for Sanctions.

to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law' ").

In the Idaho prison system, however, access to the assistance of law clerks and the libraries was not necessarily a risk-free proposition. For example, inmate preparation of legal documents and prosecution of legal activities became a basis for retaliation against inmate clerks. In 1985, Lee Hays worked as an inmate law clerk at the Idaho Correctional Institute-Orofino (ICI-O). In that role, he assisted fellow male inmates in filing habeas corpus petitions and civil rights claims against the prison and various prison personnel. This attracted the attention of the prison staff, who, in the presence of the warden, instructed Hays to stop. After Hays filed more suits, the warden arranged for him to be transferred to the Idaho State Correctional Institution (ISCI) in Boise. Although Hays was supposedly transferred for a rule infraction – interacting with female inmates – that reason was pretextual. He trained female law clerks as part of his law clerk duties and did so only on instructions and under supervision of a corrections lieutenant.

Similar consequences befell other inmates who took legal action. In 1987, inmate Patrick Hall filed multiple civil rights claims against the Department on behalf of other inmates. Hall subsequently lost his job in the ISCI law library, purportedly because he only offered legal help in exchange for a share of any damages award – a charge that was unsubstantiated. In 1993, an ISCI Disciplinary Hearing Officer threatened to confine and discipline another inmate, Wayne Olds, if in line with his

standard duties as a law clerk, he helped an inmate prepare for a disciplinary hearing. Olds was later transferred from ISCI to ICI-O in retaliation for the number of "concern forms" and grievances he filed, together with his persistence in prosecuting a federal civil rights case. Two years later, inmates Thomas Sanger and Carl Shively were fired from their janitorial jobs in retaliation for signing affidavits used in litigation against the Department. And Idaho Maximum Security Institution (IMSI) officials intimidated inmate Michael McDonald for filing a grievance against an officer, forcing him to withdraw his grievance and to plead guilty to a disciplinary infraction. This series of retaliatory acts all stemmed from the inmates' constitutionally protected efforts to access the courts and the grievance process.

The operation and condition of the inmate law libraries and related complaints also became an issue in the Idaho prison system. Inmate Alfredo Roman, who worked as a law clerk in the IMSI library, kept a logbook documenting what he perceived as operational problems. One such problem was a corrections officer's habit of reading the inmates' legal documents. Roman took his concerns and his logbook to the law library supervisor, Corrections Officer Michelle Nelson. Ms. Nelson responded by removing Roman from his library job and placing him under investigation for keeping his logbook (which she considered "non-legal materials") in the law library. He eventually received two disciplinary citations.

Similarly, in 1997, inmate Bob Jones, a law clerk at the ISCI law library, confronted Nelson with his concerns about management of the law library. As a result, Nelson repeatedly attempted to have Jones transferred, first to

ICI-O, and then to a prison facility in Louisiana. Finally, Jones resigned his job at the law library to avoid a transfer.

Deputy Warden George Miller took over supervision of the ISCI law library in November 1998. Although he was aware that the library needed at least six inmate law clerks to facilitate minimal access to the court system, he reduced the staff to four and at times allowed it to drop to two. Miller knew that the number of law clerks working in the library fell below what was minimally adequate. The district court found that the reduction in law clerks "was substantially motivated by a desire to prevent inmates' access to the court system."

No officer or employee of the Department was ever investigated or disciplined for retaliatory action, despite the wardens' knowledge of the complaints.

Plaintiff-appellees, inmates in the Idaho corrections system, brought this suit for damages and injunctive relief as a class action on behalf of themselves and other inmates. They worked on the case themselves, and were represented by outside counsel, with whom they corresponded in writing. As it turned out, the confidentiality of that correspondence was somewhat illusory. The inmates kept their written materials, including notes, research, and correspondence with their attorney, in two three-ring binders marked "*Gomez*" – the name of this lawsuit. In order to protect those materials and to maintain their confidentiality, the inmates stored the binders in a restricted-access section of the ISCI law library. If an inmate who worked on the case needed to read or use the file, a request would be made to the librarian, who would

retrieve the file and check it out to that individual. The district court found that "the inmates could not have done anything more to secure the confidentiality of these documents because there are no areas in the prison that are accessible only to inmates."

The clearly-marked file, at some point, attracted the attention of a prison employee, who in February 1997 made a copy of a letter from the inmates' counsel to nine inmates. The employee, who found the letter lying face-up on the law library desk of an inmate law librarian, gave the copy to the Department's lead counsel in this case, a Deputy Attorney General for the State of Idaho. The letter contained a summary of the strengths of the inmates' claims. Department's lead counsel kept the letter, and did not notify opposing counsel, the court, or her superiors that it was in her possession. It remained in her desk "in-box" for the next eight months.

That was only the beginning of the trail of documents from the prison library to Department's lead counsel's office. Four months later, another ISCI employee who worked in the law library noticed, as he checked the *Gomez* binders out to an inmate, that the binders contained documents related to this litigation. He understood the significance of the case because he had previously worked on this very lawsuit as a paralegal for the Department, and recognized documents in the binder he had worked on in that capacity. The official contacted the Department's lead counsel and told her that some documents indicated that the inmates' outside counsel may have misled the magistrate judge during an earlier hearing with regard to whether inmates had suffered

physical injury in retaliation for litigation. The Department's lead counsel told the prison official to copy the documents and deliver them to her, which he did. Counsel did not inform the court, the inmates, or their attorney about the document disclosure.

The Department's lead counsel reviewed the materials, dividing them into four categories, one of which consisted of documents she suspected were privileged.[4] The next day she contacted her co-counsel, who was also her supervisor, and they read several of the documents. In their view, some of the letters demonstrated that the inmates' lawyer was defrauding the court. Believing that they had come across evidence of fraud or contempt of court, lead counsel continued to acquire other documents from the inmates' *Gomez* file. Neither she nor her co-counsel informed opposing counsel that they had seen the correspondence or other documents. Over the course of the next five months, Department counsel received ten additional copies of documents from prison employees.

Some four months after speaking to lead counsel about the letters, and eight months after lead counsel had first acquired documents, co-counsel decided to seek advice. He consulted with his supervisor, who in turn approached an official at the Idaho State Bar. The bar official and the supervisor advised co-counsel not to read any more documents and to turn over to the court those documents that were in his possession. Nonetheless, both

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[4] Despite her recognition that privilege might apply, she reasoned that any privilege was waived by virtue of the documents' location – a section of the law library easily accessible to prison employees.

the lead counsel and her co-counsel, Idaho Deputy Attorneys General, continued to receive and read case-related documents given to them by the prison employee, justifying the continued receipt of documents on the ground that the materials were "similar to what had already been given to [them]."

Subsequently, the Department filed a motion for an order to show cause why inmates' counsel should not be held in contempt of court, based on copies of the correspondence between the inmates and their lawyer. The documents purportedly showed that physical injury to inmates was not as extensive as inmates' counsel had represented to the court in an earlier hearing. The court denied that motion, concluding that the representations of inmates' counsel were well within the realm of acceptable argument and did not constitute a fraud.

Trial and Findings.

After a nineteen-day bench trial, followed by a lengthy series of evidentiary rulings, hearings, and various motions over the next several months, the district court issued findings of fact and conclusions of law in the underlying case. The court found the facts summarized above, including repeated instances of retaliatory conduct. Significantly, the court found that

> an investigation to determine whether illegal retaliation had occurred was not conducted even though prison administrators were faced with allegations clearly indicating that correctional officers had violated IDOC [Idaho Department of Corrections] policy and conducted

> reprisals against an inmate who attempted to seek relief through established . . . procedures.

The court granted a declaratory judgment that the inmates were subjected to instances of unlawful retaliation but denied class-wide prospective injunctive relief. The court granted individual injunctive relief to six specified inmates.

Sanctions Order.

The inmates moved for an order to show cause why Department counsel should not be sanctioned for their conduct in reading, using, and failing to disclose their access to the *Gomez* files. After a three-day hearing, the court awarded sanctions of $4,500 ($3,500 in attorneys' fees and $1,000 for costs and expenses) under the court's inherent power and 28 U.S.C. § 1927. The court found that Department counsel had acquired materials that are confidential and protected by the attorney-client privilege. In addition, the court found that counsel had implicitly authorized and encouraged prison employees "to secretly search for, inspect, examine, read, copy and then deliver . . . confidential attorney-client correspondence or documents" over a nine-month period. The court held that Department counsel completely disregarded the attorney-client privilege and ignored their individual ethical duty to submit the materials to the court. The court found, as a factual matter, that counsel's actions in acquiring and using the materials and in moving for contempt created unnecessary litigation. Finally, the court concluded that the state attorneys' "breach[ ][of] the attorney-client privilege, as well as compromising the

confidential communications flowing from the legal representatives . . . constituted bad faith conduct and warrants the imposition of sanctions."

Analysis

I. Consent to Appear Before the Magistrate Judge

We first address the threshold jurisdictional question of whether all parties consented to trial before the magistrate judge. Specifically, the Department argues that the magistrate judge was without authority to order judgment because IMSI Warden Dave Paskett had not consented, in his official capacity, to appear before the magistrate.

A magistrate judge may conduct civil proceedings and order the entry of judgment only if the magistrate judge has been "specially designated to exercise such jurisdiction by the district court," 28 U.S.C. § 636(c)(1), and all parties clearly and unambiguously consent, Fed. R. Civ. P. 73(b); *Hajek v. Burlington N. R.R.*, 186 F.3d 1105, 1108 (9th Cir. 1999). Because the district court designated the magistrate judge to hear this case, the issue we must resolve is whether Warden Paskett consented. The consent of the other parties is not at issue.

Section 636(c) "does not specify the precise form or timing of the parties' consent." *Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (9th Cir. 2001). It is well settled that written consent authorizes a magistrate judge to enter judgment. *See Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999). Absent such consent, however, the magistrate judge lacks jurisdiction, and any judgment

entered is a nullity, which we have no jurisdiction to review. *See Aldrich v. Bowen*, 130 F.3d 1364, 1365 (9th Cir. 1997) (noting that the "record contain[ed] no written evidence"); *Estate of Conners v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993) (holding that a magistrate judge's judgment without consent is a nullity).

Review of the record before us leaves little doubt that all parties consented to proceed before the magistrate judge. The original complaint named not only the Department but Paskett in his capacity as warden of ISCI. All counsel filed a written "Consent to Proceed Before a United States Magistrate." During the course of the litigation, Paskett became warden of IMSI and Joe Klauser succeeded him as warden of ISCI. Before trial, the inmates' counsel sought to amend their complaint to, among other things, substitute the appropriate defendants. In a pretrial statement, counsel for the Department declared that the Department did not object to the substitution: "Defendants do stipulate to charging [sic] the named Defendants." In that same document, the Department stated: "[the] parties have already agreed to trial of this case before United States Magistrate Judge Larry M. Boyle." Read together, these clear and unambiguous stipulations in the pretrial statement constitute consent to proceed before the magistrate judge. *See, e.g., General Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1495 (11th Cir. 1997) (consent to trial before magistrate was clearly expressed, even though the stipulation did not list all defendants, but all defendants were present at the status conference and their attorney signed the stipulation). Accordingly, the magistrate judge had jurisdiction

to enter judgment, and we have jurisdiction to entertain this appeal.

II. Retaliation

A. Causal Nexus

The district court's 36-page order, which includes extensive findings of fact, is a model of clarity and detail. The Department does not challenge the factual findings; nor, with the exception of Jones, *infra* section II.B, does it dispute the district court's legal conclusion that the inmates suffered retaliation for the exercise of their First Amendment rights. Rather, the Department argues, as a matter of law, that the findings do not establish a causal link between the official policy or custom of the prison administrators and the retaliatory acts of the individual prison officials.

A suit, like this one, against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself. *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986). Thus, the Department administrators are liable in their official capacities only if policy or custom played a part in the violation of federal law. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991); *McRorie*, 795 F.2d at 783.

A policy or custom may be found either in an affirmative proclamation of policy or in the failure of an official "to take any remedial steps after the violations." *Larez*, 946 F.2d at 647; *see also McRorie*, 795 F.2d at 784 (custom inferred from failure to reprimand or discharge); *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 171 (5th

Cir. 1985) ("[S]ubsequent acceptance of dangerous recklessness by policymaker tends to prove his preexisting disposition and policy."). For example, in *Larez*, we held that the Chief of Police would be liable if "it was almost impossible for a police officer to suffer discipline as a result of a complaint lodged by a citizen." *Larez*, 946 F.2d at 647 (internal citation omitted).

The Department argues that the policy-making official is liable only if he directly ordered the retaliation in question. Where the retaliatory acts are traceable to a custom or policy, however, it is unnecessary to demonstrate that the decision-making official directly ordered each act carried out under his edict. A custom or policy establishes a general rule of behavior, which is to be followed in a variety of circumstances, and even in the absence of the policy-maker. *See Larez*, 946 F.2d at 647. Moreover, a policy-maker's pronouncement that he has not or will not discipline officers that retaliated against prison litigators is sufficient evidence of a policy or custom: those statements can "be[ ] considered to represent [the prison's] policy or custom of condonation of, and acquiescence in, [retaliation] by its offic[ials]." *Id.*

The findings of fact detail the top administrators' failure to investigate the retaliation complaints, the lack of reprimand or discipline for the officers involved even when their supervisors were aware of the complaints, and the delegation of investigation to officers involved in the grievances. This turn a-blind-eye approach does not insulate the Department. On the contrary, the findings are more than sufficient to support the conclusion that the retaliatory acts were condoned by the officials, sufficient to "ma[k]e clear to officers that . . . they could get away

with anything." *Id.* The Department's failure to investigate or correct constitutional violations supports the district court's finding that there was a policy or custom that led to violation of the inmates' rights.

B. Harm to Bob Jones

The Department also contends that the repeated but ultimately unsuccessful attempts to transfer inmate Jones are not retaliatory as a matter of law because the transfers never took place. The reality is that in the face of repeated threats of transfer because of his complaints about the administration of the library, Jones eventually quit his law library job. According to the findings, Jones' complaints – protected by the First Amendment – related to "how [the law library] was affecting the inmates' right to access the courts." As we observed in *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights. *Id.* at 269 (noting that "this court has reaffirmed that prisoners may still base retaliation claims on harms that would not raise due process concerns"); *cf. Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000) (without alleging a chilling effect, a retaliation claim without allegation of other harm is not actionable). It is the chilling effect that forced Jones to quit his job, not a generalized harassment claim. Therefore, the district court did not err in finding, as a matter of law, that the Department retaliated against Jones, in violation of his First Amendment rights.

III. Injunctive Relief

The injunctive relief entered in this case was very narrow and targeted at six specific individuals. Class-wide prospective injunctive relief was denied. The district court went to great lengths to discuss the legal parameters for injunctive relief, the constitutional limitations on court decrees directed to prison administrators, the requirements of the Prison Litigation Reform Act, and the importance of remedying unconstitutional conduct. As the court explained,

> in determining the appropriateness of relief in the instant action, the Court has considered when relief is appropriate, how relief must be tailored when conditions of prison confinement are challenged and the Court's role in protecting and preserving federally guaranteed rights.

Despite this careful tailoring, the Department argues that the injunctive relief was granted in error because the district court misapplied the standard for irreparable injury and failed to properly limit the injunction's scope.

In general, injunctive relief is "to be used sparingly, and only in a clear and plain case." *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (internal quotation omitted). "A district court's grant of permanent injunctive relief is reviewed for an abuse of discretion or application of erroneous legal standards." *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999) (citing *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996)). When a government agency is involved, we must, in addition, observe the requirement that the government be granted the "widest latitude in the dispatch of its own internal affairs." *Rizzo*, 423 U.S. at 378-79

(citations omitted); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."). When a state agency is involved, these considerations are, if anything, strengthened because of federalism concerns. *See O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) ("proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers"). Accordingly, injunctive relief is appropriate only when "irreparable injury" is threatened, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), and any injunctive relief awarded must avoid unnecessary disruption to the state agency's "normal course of proceeding," *O'Shea*, 414 U.S. at 501.

This well-established standard for injunctive relief must also be viewed in conjunction with the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA").[5] Under the PLRA, the court must find that the

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[5] The PLRA provides, in relevant part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

prospective relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right," before granting injunctive relief. 18 U.S.C. § 3626(a)(1). Accordingly, "before granting prospective injunctive relief, the trial court must make the findings mandated by the PLRA [and must] give 'substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.' " *See Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1997) (quoting 18 U.S.C. § 3626(a)(1)) (holding that Congress explicitly prescribed section 3626's reach to include pending cases).

Although the PLRA significantly affects the type of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards required to justify an injunction. To this extent, we agree with the Sixth Circuit that "the [PLRA] merely codifies existing law and does not change the standards for determining whether to grant an injunction." *Smith v. Ark. Dep't of Corr.*, 103 F.3d 637, 647 (6th Cir. 1996).

A. Irreparable Injury

To satisfy the requirement of irreparable injury, a plaintiff must demonstrate a "real or immediate threat

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18 U.S.C. § 3626(a)(1)(A). Because this is a "civil proceeding arising under Federal law with respect to . . . the effects of actions by government officials on the lives of persons confined in prison," it is a prison conditions case for purposes of the PLRA. 18 U.S.C. § 3626(g)(2).

that the[y] will be wronged again – a 'likelihood of substantial and immediate irreparable injury.' " *Lyons*, 461 U.S. at 111 (quoting *O'Shea*, 414 U.S. at 502); *see also Lewis*, 518 U.S. at 349 (courts limited to "provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). "A state law enforcement agency may be enjoined from committing constitutional violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct." *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992). *See also Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) ("Injunctive relief is appropriate in cases involving challenges to government policies resulting in a pattern of constitutional violations.").

The record demonstrates that continued retaliation for inmates' exercise of their constitutional rights is a real threat. As found by the district court, the inmates have proven that the Department retaliated against them for exercising their right to access the courts on a number of occasions spanning a decade, and that the retaliation was pursuant to a custom or policy. Despite supervisors' knowledge of this pattern, no investigation, no discipline, and no corrective action followed. Now the Department claims that its employees will not retaliate again. The district court, however, found little comfort in that proclamation because no policy or mechanism is in place to back up that promise.[6] *Cf. United States v. Odessa Union*

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[6] The district court noted "that [Department] officials testified at trial that they have not created a rule which prohibits individual officers from improperly asserting influence upon a

Warehouse Co-op, 833 F.2d 172, 176 (9th Cir. 1987) ("Courts must beware of attempts to forestall injunctions through remedial efforts and promises of reform that seem timed to anticipate legal action, especially when there is the likelihood of recurrence."). The court concluded that some relief is necessary to prevent future retaliatory transfers and to expunge the records of references based on retaliatory action. Implicit in these rulings is a determination that, absent the injunction, the likely harm would be irreparable.

B. Scope of Injunction

Having concluded that the circumstances justify injunctive relief, we must next determine whether the relief granted was properly tailored. *See Lewis*, 518 U.S. at 360 ("The scope of injunctive relief is dictated by the extent of the violation established") (internal quotation omitted). Accordingly, we must consider whether the court's "exercise of equitable discretion . . . heel[s] close to the identified violation and respect[s] the interests of state and local authorities in managing their own affairs, consistent with the Constitution," *Gilmore v. People of the State of California*, 220 F.3d 987, 1005 (9th Cir. 2000) (citation and internal quotation marks omitted), and, in the language of the PLRA, whether it "extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1).

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transfer coordinator in order to include a burdensome and litigious inmate on the list of inmates that are to be transferred."

We hold that the relief was appropriately tailored, and is the least intrusive means to correct the violation. Thus, the district court did not abuse its discretion.

The district court properly limited its injunction to a combination of prospective and retrospective relief granted to just six inmates, denying class-wide injunctive relief. Three inmates received retrospective relief – certain references were expunged from Roman's Disciplinary Offense Report; and Sanger and Shively were restored to janitorial employment at their pre-retaliation pay level, and all retaliatory disciplinary references were cleared from their institutional files. Because the retrospective relief does not raise the same federalism concerns as a court's ongoing supervision in a prison's affairs, and because it was limited to remedying the prison's retaliatory acts, such relief passes constitutional muster. *See Lewis*, 518 U.S. at 357.

Five inmates received prospective relief. The district court enjoined the Department from adversely affecting Sanger's and Shively's pay level and employment because of this lawsuit. The judge also required the Department to ensure that any decision to transfer inmates Hays, Jones, and Olds satisfied objective criteria, was not influenced by individual officers who might be the subject of a lawsuit or grievance, and was not taken as a result of the inmates' exercise of their federally guaranteed rights. None of these remedies requires the continuous supervision of the court, nor do they require judicial interference in the running of the prison system. *Cf. Rizzo*, 423 U.S. at 369; *O'Shea*, 414 U.S. at 493 (reversing injunction requiring district court to scrutinize county's criminal justice system to ensure state court

officials did not deprive the plaintiff class of their constitutional rights); *Lyons*, 461 U.S. at 100 (reversing city-wide injunction preventing police use of choke-holds, and requiring regular officer training and record keeping). Indeed, the magistrate judge declared that he had "no intention of overseeing prison inmate transfer operations to the extent requested by Plaintiffs." And, as required by the PLRA, the prospective relief focused specifically on those few actions necessary to correct violations of individual inmates' rights.

In sum, the relief granted addressed only the harm caused each individual inmate. It did not apply to the prison system as a whole, or even to classes of prisoners. At most, the injunction affects a few isolated decisions over the course of these inmates' sentences. In the face of page after page of findings with regard to violation of the inmates' constitutional rights, the narrow injunction can only be characterized as minimal and virtually non-intrusive. Accordingly, the court did not abuse its discretion in granting such narrowly drawn injunctive relief.

IV. Sanctions

This case presents the remarkable circumstance where counsel for the state received, read, and used bootlegged copies of legal correspondence between inmates and their lawyer. The district court imposed sanctions against defense counsel – under both its inherent power and its statutory authority pursuant to 28 U.S.C. § 1927 – for this misconduct. At issue are, as the court put it, sanctions for counsel's "secretly acquiring, reading, retaining, sharing [privileged] information

. . . and using information for potential tactical advantage. . . . " Although this is strong language, the record amply supports the court's findings and conclusions that the documents were privileged, that counsel violated the privilege and their ethical duty, and that sanctions were justified.

We address first the question of privilege, and next whether sanctions were warranted under the court's inherent power and 28 U.S.C. § 1927.

A. Attorney-Client Privilege

Federal common law recognizes a privilege for communications between client and attorney for the purpose of obtaining legal advice, provided such communications were intended to be confidential. *See generally* WEINSTEIN'S FEDERAL EVIDENCE, Chp. 503. The attorney-client privilege has been recognized as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Practicing attorneys recognize the importance of the privilege and the safe harbor that it provides to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Id.*

Both the Supreme Court and this court have underscored the importance of the privilege, even where an attorney seeks to invoke the crime-fraud exception:[7]

> [U]nder *United States v. Zolin*, 491 U.S. 554 (1989), the district court could not consider the contents of a privileged letter in assessing the government's prima facie case until the government had, as a threshold matter, presented non-privileged evidence "sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."

United States v. de la Jara, 973 F.2d 746, 748 (9th Cir. 1992).

The privilege, however, is not absolute. The privilege may be waived by the client either implicitly, by placing privileged matters in controversy, or explicitly, by turning over privileged documents. Inadvertent disclosure can also result in a waiver of the privilege. *See Weil v. Investment/Indicators*, 647 F.2d 18, 24 n. 11 (9th Cir. 1981). But, as we have held, when there has been an involuntary disclosure, the privilege will be "preserved if the privilege holder has made efforts 'reasonably designed' to protect the privilege. . . . Conversely . . . the privilege [will be deemed] to be waived if the privilege holder fails to

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[7] The attorney-client privilege does not extend to communications in furtherance of a crime or fraud. *See United States v. Zolin*, 491 U.S. 554, 562-63 (1989). The district court explicitly rejected the argument and the Department does not argue before this court, as it did before the district court, that the materials fall under this exception. Rather, they rely on their argument that the privilege was waived.

pursue all reasonable means of preserving the confidentiality of the privileged matter." *de la Jara*, 973 F.2d at 750 (internal citation omitted). *See also* Moore's Federal Practice 3d § 26.47[5].

The pitfalls of inadvertent disclosure and the dilemma posed for counsel who are in receipt of such materials has prompted the American Bar Association Standing Committee on Ethics and Professional Responsibility to issue two formal opinions on the subject. These opinions reflect some of the same principles articulated in *Zolin*. In November 1992, the Committee issued an opinion, based upon the Model Rules of Professional Conduct, relating to the inadvertent disclosure of confidential materials. The opinion provides:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 368 (1992). Two years later, the Committee issued another formal opinion, this one regarding the unsolicited receipt of privileged or confidential materials. The committee stated:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent

> required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 382 (1994).

In the present case, the district court found that counsel implicitly authorized and encouraged department employees to search for and photocopy letters from opposing counsel that were kept in the inmates' legal files related to this case. This happened not once, or twice, but several times over the course of over nine months. The confidential status of the letters was facially evident – they were on legal letterhead easily identifiable as that of opposing counsel. One letter to an inmate even specified that it was "for your eyes only." But if that was not enough, the contents of the letters remove all doubt. They contained, in the words of the district court, a "summary of [plaintiffs' counsel's] analysis of the strengths of some of Plaintiffs' claims, settlement prospects and prospects for recovery at trial" – this at the same time that the parties were conducting settlement negotiations. The letters reviewed litigation strategy, theories of the case, and other sensitive issues. Further correspondence discussed the evidence available regarding "actual injuries resulting from [the Department's] alleged failure to provide constitutionally required access to the courts." In short, these documents were of the most sensitive kind – the kind that any trial lawyer would recognize

as privileged, highly valuable, very confidential, and potentially devastating in the wrong hands.

Thus, there can be no serious question that the material in the present case was privileged. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1070-71 (9th Cir. 1992). In sorting the materials into categories, including documents that might be privileged, the Department's counsel demonstrated that they understood the legal import of this treasure trove of documents. In fact, the significance was explained to them more directly by an official from the Idaho State Bar. Eight months after the first documents were acquired, co-counsel went to his superior, who sought advice from the state bar. The bar official and the supervisor advised co-counsel not to read any more documents and to turn over to the court those already in their possession. But, even with the advice of the Bar, counsel for the State plowed ahead, receiving and reading more documents. Finally, in a remarkable display of chutzpah, counsel did go to the court – but with a motion for contempt, premised on the inmates' privileged documents.

Counsel for the state reasoned at the time, and the Department continues to argue to this court, that the inmates waived any applicable privilege by storing the "*Gomez*" binders in a section of the library accessible to prison employees. The Department's argument that the privilege was waived is without merit. Given the significance of the documents, the inmates of course took steps to maintain their confidentiality. As the district court found, by marking the binders with the name of the case, placing it on a restricted-access shelf, and requiring a sign-out procedure for use of the file, "the inmates could

not have done anything more to secure the confidentiality of these documents because there are no areas in the prison that are accessible only to inmates."

Thus, the inmates' actions to preserve the confidentiality of the materials were not only reasonable, but were found, as a question of fact, to be the best possible in the prison context. The prison setting poses unique challenges to the privilege issue because of security and physical layout considerations. And the prison, of course, has a penological interest in curtailing the prisoner's privacy rights. *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (inmates have no expectation of privacy in their living quarters); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (prisoner's privacy rights curtailed by prison's security interests). The Department, however, does not urge us to conclude that the reduced privacy required by penological necessity renders it impossible for inmates to keep privileged documents confidential. To so conclude would undermine a critical component of the right of access to the courts, namely, the opportunity to receive privileged communications from counsel. As the Supreme Court has held, the inmates' First Amendment and other rights pertaining to privileged correspondence are "not inconsistent with [their] status as . . . prisoners or with the legitimate penological objectives of the correctional system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

The district court found that the Department had in place reasonable policies providing precautions that were intended to protect and preserve the confidential nature of attorney-client correspondence. We conclude that the district court did not clearly err when it found that the

inmates did all they could to secure the documents' confidentiality and that they did not waive the privilege.

B. Inherent Power

A court has the inherent power to sanction a party or its lawyers if it acts in "willful disobedience of a court order . . . or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," as well as for "willful[ ] abuse [of the] judicial processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) (internal citations and quotations omitted); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47 (1991) (where litigant "engaged in bad faith or willful disobedience of a court's order," inherent power "extends to a full range of litigation abuses"). We review a court's imposition of sanctions for abuse of discretion. *See Chambers*, 501 U.S. at 55 (inherent power).

We recently addressed the appropriate basis for an award of sanctions under a court's inherent authority in *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001). We held that *Roadway* and *Chambers* require that inherent-power sanctions be preceded by a finding of bad faith, or conduct tantamount to bad faith. *Id.* at 993. Under this standard, although recklessness, of itself, does not justify the imposition of sanctions, sanctions are available when recklessness is "combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Id.* at 994. Sanctions, then, are justified "when a party acts *for an improper purpose* – even if the act consists of making a truthful statement or a non-frivolous argument or objection." *Id.* at 992 (emphasis in original).

We conclude that the district court did not clearly err in finding conduct tantamount to bad faith here. *See Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000) (district court's finding as to bad faith is reviewed for clear error). The notion that receipt of privileged communications imposes a duty on counsel to take some reasonable remedial action is hardly a novel concept. It stems from common sense, ethical rules and the origins of the privilege. Of course, had Department counsel entertained any doubt that they possessed the materials improperly, the opinion of the Idaho State Bar representative should have dispelled it. Yet – and this is particularly troubling for us, as it was for the trial court – the attorneys continued to collect and read documents after being advised by the state bar to send the documents to the court. As the district court concluded, counsel "each had an individual ethical and professional duty to immediately seal and submit to the Court both the initial correspondence and the correspondence subsequently received from [Department] personnel as soon as they became aware that the correspondence involved confidential communications between [inmates' counsel] and the inmate plaintiffs."

Department counsel's actions in this case do not pass even the most lenient ethical "smell test." They knowingly disregarded advice from the bar counsel and bypassed questions of ethics in an effort to gain advantage in this litigation. Despite their roles as officers of the court, they failed to inform the court of their possession of the privileged materials until eight months after the first acquisition. In view of the circumstances surrounding the acquisition and use of the privileged documents,

we conclude that the district court did not abuse its discretion in finding that the attorneys acted in bad faith and in imposing sanctions under the court's inherent power.

C. Section 1927

The court also based its sanctions decision on § 1927, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously. . . . " 28 U.S.C. § 1927. Section 1927 requires a finding of recklessness or bad faith. *In re Keegan Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir. 1996). Sanctions are available under § 1927, however, only if the attorney "unreasonably and vexatiously" multiplies proceedings. 28 U.S.C. § 1927. In the present case, the Department's contempt motion resulted in a hearing on that motion plus a three-day evidentiary hearing on the follow-on sanctions motion, in effect adding an extra "trial" to the declaratory and injunctive relief action. The court found, as a question of fact, that "[u]nnecessary litigation was created by the series of events of secretly acquiring, reading, retaining, sharing information with representatives of [the Department], and using the information for potential tactical advantage instead of promptly notifying opposing counsel and/or submitting the documents to the Court. . . . " In the face of this finding, the court did not abuse its discretion in awarding sanctions under § 1927.

In closing, the district court noted that the sanctions were no more than necessary "in order to preserve the time-honored principles involved or to maintain public trust in the legal profession." We agree. The result here

does not set up an impractical or insurmountable hurdle for counsel facing an ethical dilemma concerning privileged documents. The path to ethical resolution is simple: when in doubt, ask the court.

AFFIRMED.

GOULD, Circuit Judge, concurring in the judgment:

I concur in parts I, II, III, IV.A, and IV.C of the majority opinion and in the judgment affirming the district court. The sanctions properly can be affirmed pursuant to 28 U.S.C. § 1927 because the conduct of counsel for the state was so unjustified as to be in reckless disregard of the inmates' rights. *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) ("imposition of sanctions under section 1927 requires a finding that counsel acted recklessly or in bad faith, while those imposed under the court's inherent power require a finding that counsel's conduct constituted or was tantamount to bad faith") (internal quotation marks and citations omitted). I would, however, stop short of holding that counsel for the state acted in bad faith and I do not concur in part IV.B of the majority opinion.

Counsel for the state made serious errors of judgment. The record does not establish intentional acts of subjective bad faith, however, because the record as a whole supports that counsel proceeded under the mistaken assumption that the attorney-client privilege was waived and advanced a mistaken theory that inmates' counsel was committing a fraud on the court. I conclude that counsel for the state were seriously wrong in their

assessment on both these issues, but I do not conclude that counsel acted with any intentional ill motive. Nor would I sustain a finding of fact that government counsel acted in bad faith; this determination rests on an issue of degree affecting the possible waiver of privilege that was debatable before the district court's finding that inmates took reasonable steps to protect confidential materials. In any event, bad judgment is not tantamount to bad faith.

It is unfortunate that the important issues of inmates' rights and legitimate penological concerns of the government to a degree were obscured by distracting disputes between counsel about their professional ethics. Initially, counsel for the state challenged inmates' counsel asserting fraud on the court and asking for a contempt determination. Later, inmates' counsel accused counsel for the state of acting in bad faith, asking for a sanctions determination. The ethics dispute necessarily focused attention on the lawyers and off the issues at stake between inmates and corrections officials.

Based on the district court's findings, I would affirm the imposition of sanctions without finding subjective bad faith on the part of counsel for the state.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al., Plaintiffs, v. JAMES C. SPALDING, et al., Defendants.	Case No. CIV 91-0299-S-LMB FINDINGS OF FACTS, CONCLUSIONS OF LAW, MEMORANDUM DECISION AND ORDER (Filed Mar. 16, 1999)

I.

INTRODUCTION

Plaintiffs represent a class consisting of all persons who are now, or in the future may be, incarcerated at the Idaho State Correctional Institution (ISCI) or at the Idaho Maximum Security Institution (IMSI) operated by the Idaho Department of Correction (IDOC). On June 21, 1991, Plaintiffs filed their original complaint pursuant to 42 U.S.C. § 1983 of the Civil Rights Act of 1871, alleging that they had been denied meaningful access to the courts as well as being subjected to unlawful retaliation for exercising their rights guaranteed by the First Amendment to the United States Constitution. Pursuant to the complaint, Plaintiffs seek an injunction against Defendants prohibiting them from denying inmates meaningful access to the courts and from engaging in retaliatory conduct.

The named Defendants consist of official capacity administrators of IDOC, ISCI and IMSI. At the time the

original complaint was filed, these administrative positions were held by IDOC Director Richard Vernon and ISCI Warden Dave Paskett. At the time of trial, Defendant James Spalding was the Director of IDOC, Defendant Joe Klauser was the Warden at ISCI and Defendant Dave Paskett was the Warden at IMSI.

On January 7, 1998, Defendants adopted a new access to courts system and on January 16, 1998, the Court bifurcated the trial to allow the retaliation allegations of the instant action to proceed and continued the portion of the trial with respect to the access to courts claims.

The trial on the retaliation claims commenced at the courtroom in the Idaho Maximum Security Institution on February 2, 1998 and concluded on March 20, 1998. After the submission of post-trial memoranda, and proposed findings of facts and conclusions of law, counsel for the respective parties presented oral argument to the Court on August 5, 1998. The retaliation aspect of this action is fully submitted and is ready for final determination by the Court.

II.

STANDARDS APPLICABLE TO PLAINTIFFS' RETALIATION CLAIMS

The Supreme Court of the United States has clearly held that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct.

2800, 2804, 41 L.Ed.2d 495 (1974) (quoting *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948)). In *Pell*, the Supreme Court went on to state:

> In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

Id. Plaintiffs allege that First Amendment rights, consistent with both their status as prisoners as well as legitimate penological objectives of the State, have been deprived and thus they brought this instant action pursuant to 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

"Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or

immunity protected by the Constitution or laws of the United States." *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986)).

Defendants take the position in this action that any alleged conduct or acts were to fulfill valid penological goals of the Department of Correction and not in retaliation for the prisoners' exercise of First Amendment protected activities.

The United States Court of Appeals for the Ninth Circuit has held that prisoner retaliation claims, like those alleged in the instant action, "state a valid cause of action under § 1983." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). In 1995, the Ninth Circuit determined that it was necessary to review those retaliation cases which followed its earlier decision in *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), due to a subsequent decision issued by the United States Supreme Court, *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Although the issue before the Supreme Court in *Sandin* did not involve the proper elements of a § 1983 prisoner retaliation claim, the Supreme Court used strong language which indicated its desire to avoid "involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U.S. at 482, 115 S.Ct. at 2299. In *Sandin*, the Supreme Court noted that when federal courts become involved in such management they fail to "afford appropriate deference and flexibility to state officials trying to manage a volatile environment" and that

"[s]uch flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims" filed under § 1983. 515 U.S. at 482-83, 115 S.Ct. at 2299. After reviewing *Sandin*, the Ninth Circuit upheld the contours of a retaliation claim as pronounced in *Rizzo* and its progeny, but indicated that they should be applied in light of the deferential attitude articulated by the Supreme Court in *Sandin*. *Pratt*, 65 F.3at 806.

For a prisoner to properly state a claim under § 1983 for unlawful retaliation for a prisoner's attempts to exercise First Amendment rights, the prisoner:

> [M]ust do more than allege retaliation because of the exercise of his first amendment rights in bringing and assisting in civil rights litigation; he must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals.

Rizzo, 778 F.2d at 532. Thus, the prisoner, in an action such as this currently before this Court, must submit evidence establishing a link between the exercise of a constitutional right and the alleged retaliatory action. *See Valandingham v. Bojorquez*, 866 F.2d 1135, 1138-39 (9th Cir. 1989). Accordingly, the prisoner plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the alleged retaliatory conduct at issue. *Pratt*, 65 F.3d at 806. Further, the plaintiff must also demonstrate that "the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision" to engage in the retaliatory conduct. *Soranno's Gasco Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citing *Mt.*

Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977)).

The Ninth Circuit has made it clear that it is "established beyond doubt that prisoners have a constitutional right of access to the courts" and that "[a] prisoner's right to meaningful access to the courts, along with his broader right to petition the government for a redress of his grievances under the First Amendment, precludes prison authorities form [sic] penalizing a prisoner for exercising those rights." *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995) (internal quotations and citations omitted). "The right of meaningful access to the courts extends to established prison grievance procedures." *Id.* (quoting *Valandingham*, 866 F.2d at 1138). Further, the Ninth Circuit has held that not only is a prisoner's own pursuit of legal relief constitutionally protected, but the First Amendment also provides protection to a prisoner who assists fellow inmates' access to the court system. *Rizzo*, 778 F.2d at 531 (citing *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981)). Additionally, while a prisoner does not have a constitutionally protected right to government provided benefits such as prison employment or being housed at a certain facility or cell assignment, those benefits may not be withheld or withdrawn in such a manner that infringes upon rights protected by the First Amendment. *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997) ("a State may not use its control over discretionary government benefits in a manner that places excessive burdens on certain constitutional rights") (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972)); *Pratt*, 65 F.3d at 806 (a prisoner may not be moved to a new prison in retaliation for exercising First Amendment

rights, "despite the fact that prisoners generally have no constitutionally-protected liberty interest in being held at, or remaining at, a given facility").

A plaintiff alleging retaliation must establish that the challenged actions of correctional authorities did not advance valid penological goals or were not narrowly tailored to achieve such goals. The Supreme Court has held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest." *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987). In *Turner*, the Supreme Court:

> [I]dentified four factors to consider when determining the reasonableness of a prison rule: 1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; 2) "whether there are alternative means of exercising the right that remain open to prison inmates"; 3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally"; and 4) the "absence of ready alternatives" or, in other words, whether the rule at issue is an "exaggerated response to prison concerns."

Bradley v. Hall, 64 F.3d 1276, 1279-80 (9th Cir. 1995) (quoting *Turner*, 482 U.S. at 89-90, 107 S.Ct. at 2261-62 (internal quotations omitted)). While the issue before the Supreme Court in *Turner* implicated the Due Process clause and not a retaliation claim, the Supreme Court has stated that the reasonableness standard for prison rules "applies to all

circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224, 110 S.Ct. 1028, 1038 (1990); *see also Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) ("the Supreme Court has held that *Turner* applies to all constitutional claims arising in prison with the exception of Eighth Amendment claims"). "The burden is on the inmates to show that the challenged regulation is unreasonable under *Turner*." *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir. 1993). Accordingly, in determining whether Defendants' conduct in this instant action, challenged as retaliatory, served legitimate penological concerns, the Court will look to *Turner* for guidance.

Once a prisoner satisfies his burden to establish that he suffered retaliation for engaging in a protected activity and that such retaliation did not advance legitimate penological concerns, the burden shifts to the defendant to establish that the correctional activity would have been undertaken even in the absence of the prisoner's protected conduct or "that the retaliatory action was narrowly tailored to serve a legitimate penological purpose." *Morgan*, 874 F.2d at 1314 (citing *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576); *Guthrie v. Darosa*, 1998 WL 227151, at 4 (N.D.Cal. 1998) (citing *Schroeder v. McDonald*, 55 F.3d 454, 461-62 (9th Cir. 1995)). The Ninth Circuit has indicated:

> Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the

> actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point.

Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990).

The Ninth Circuit has indicated that the proper role for the courts in this type of action is not to second guess prison administration and that "for a prison regulation to pass muster 'prison officials need merely put forward a legitimate government interest, and provide some evidence that the interest put forward is the actual reason for the regulation.' " *Bradley*, 64 F.3d at 1280 (quoting *Casey v. Lewis*, 4 F.3d at 1520-21 (internal quotations and citations omitted)). Even when a regulation is determined to be rationally related to a legitimate penological interest, a reviewing court, "[w]here appropriate, . . . must also look to see if the prison rule is an 'exaggerated response to prison concerns.' " *Id.* (quoting *Turner*, 482 U.S. at 89-90, 107 S.Ct. at 2261-62).

"In order to determine whether a rule, even if rationally related to a legitimate interest, is an exaggerated response, [a court] must balance the importance of the prisoner's infringed right against the importance of the penological interest served by the rule. [The court] must also examine the strength of the logical nexus between the penological purpose served and restriction of the prisoner's rights. . . . Thus, [the] analysis does not necessarily end at the recognition that the prison rule was adopted to serve, and actually does serve, a legitimate penological interest. 'Deference does not mean abdication.' " *Id.* (quoting *Walker*, 917 F.2d at 385). However, in considering whether prison rules are an exaggerated

response to prison concerns, the reviewing court must reach its decision in light of the principle that a "prison is not required to adopt the least restrictive alternative." *O'Keefe v. Van Boening, WSP*, 82 F.3d 322, 327 (9th Cir. 1996) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 410-11, 109 S.Ct. 1874, 1880 (1989); *Turner*, 482 U.S. at 90, 107 S.Ct. at 2262).

In this instant action, Plaintiffs seek an injunction which would prohibit Defendants from engaging in retaliatory conduct. In order to establish that such relief is appropriate, Plaintiffs must establish a causal connection between the named official-capacity Defendants and the deprivation of their constitutional rights. Inasmuch as Plaintiffs seek only injunctive relief, the causal connection they are required to establish is broader and more generalized than when a prisoner seeks to hold a prison employee personally liable for damages. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Therefore, the Court must "focus on whether the combined acts or omissions of the state officials responsible for operating the state's penal system created conditions that violate[d]" Plaintiffs' right to engage in constitutionally protected activities without being subjected to retaliatory conduct. *Id.*

The Ninth Circuit has indicated that § 1983 liability may be established against anyone who personally participated in the deprivation, but also:

> Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others

> which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

McRorie v. Shimoda, 795 F.2d 780, 784 (9th Cir. 1986) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)). Thus, in the prison context, liability may be established against an official-capacity defendant by showing that a pattern of misconduct by correctional officers became so prevalent as to become a "policy or custom" of which the supervisory officials were aware of, but failed to eliminate. 795 F.2d at 783-84 (inferring actionable policy or custom after retaliatory assaults by prison officers because supervisors failed to take appropriate steps to discipline the officers or otherwise failed to admit that the officers' conduct was in error).

Thus, an official-capacity defendant's acquiescence in staff misconduct may provide the required causal connection between such conduct and the constitutional deprivation. Such acquiescence may be established by showing that the official-capacity defendants had knowledge of the constitutional violations. The Supreme Court has indicated:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . , and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. . . . For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison

> officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Farmer v. Brennan, 511 U.S. 825, 842-43, 114 S.Ct. 1970, 1981-82 (1994). While the obviousness of a risk of retaliation may be overcome by a showing that the risk escaped detection, § 1983 liability may attach if the evidence establishes that the official-capacity defendant merely refused to investigate the underlying facts that strongly suggested the existence of retaliatory conduct. 511 U.S. at 843 n.8, 114 S.Ct. at 1982 n.8. Accordingly, the named official-capacity Defendants in the instant action "will be liable in their official capacities if 'policy or custom' played a part in the violation of federal law." McRorie, 795 F.2d at 783 (quoting *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985)).

To the extent that liability for retaliation against prison inmates is established, the Court must determine the extent to which injunctive relief would be appropriate. In order to properly award injunctive relief in a class action, at least one of the named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 2183 (1996) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20, 96 S.CT. 1917, 1925 n.20, 48 L.Ed.2d 450 (1976) (quotation omitted)). Further, "[t]he remedy must . . . be limited to the inadequacy that

produced the injury-in-fact that the plaintiff has established." *Id.* (citation omitted).

Additionally, in fashioning any prospective relief, the Court must follow the requirements of the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626. *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998). Pursuant to the PLRA, a "court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* (quoting 18 U.S.C. § 3626(a)(1)). In making the findings required by the PLRA, "the court is also required to give 'substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.' " *Id.* (quoting 18 U.S.C. § 3626(a)(1)).

In resolving the issues raised in this instant action, the Court must not only "take cognizance of the valid constitutional claims of prison inmates," but also recognize that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," and that "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807 (1974), *rev'd on other grounds*, 490 U.S. 401, 411, 109 S.Ct. 1874, 1880 (1989).

The factual situation presented to the Court in resolving the issues raised in the instant action has been highlighted by the Supreme Court when it stated:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner, 482 U.S. at 84-85, 107 S.Ct. at 2259. As a result, the Court will address and attempt to resolve the instant action in light of the tension existing between "policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights." *Martinez*, 416 U.S. at 406, 94 S.Ct. at 1808, *rev'd on other grounds*, 490 U.S. 401, 411, 109 S.Ct. 1874 1880 (1989).

With the foregoing legal standards in mind, the Court will address the facts established in the retaliation aspect of this action.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having carefully considered the testimony of all the witnesses called at trial, having thoroughly reviewed all of the exhibits admitted into evidence, and considered controlling legal authority and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).

At the outset it must be pointed out that to the extent the Court has concluded that the evidence in the record does not support certain instances of retaliation alleged by Plaintiffs to have occurred, they will not be included in the court's Findings of Fact or otherwise referenced herein. In the event an incident or series of actions are not contained in these Findings of Fact, it is not an oversight or unintentional omission. Rather, the failure to mention an event or series of events in these Findings is an indication that the evidence does not support a finding of retaliation or other violation of Plaintiffs' protected rights. Likewise, while there were instances where correctional officers' conduct toward inmates was inconsiderate, rude and lacking in social courtesy, those incidents did not rise to the level of retaliatory conduct in the context of this action.

1. The number of inmates housed at ISCI is approximately 785 while the number of inmates housed at IMSI is approximately 358.

A. Retaliatory Transfers

i) Lee Hays

2. Plaintiff Lee Hays was incarcerated at ISCI in 1984. Shortly after his incarceration, he began working in the ISCI law library. Trial Transcript (Tr.) Vol. 1, p. 208, ll. 11-12, 22-23; p. 209, ll. 21-25. In late 1985, Plaintiff Hays was transferred to ICI-O where he began to work in the ICI-O law library under the supervision of Lieutenant Charles Miller. Tr. Vol. 18, p. 129, ll. 8-11. At the time Plaintiff Hays was incarcerated at ICI-O, both male and female inmates were housed there. Tr. Vol. 15, p. 156, ll.

14-17. Under the direction of Lieutenant Miller, Plaintiff Hays began to train an unexperienced female law clerk. Tr. Vol. 18, p. 104, ll. 1-4. Such training occurred during training meetings to which Hays was escorted by correctional officers as well as during disciplinary hearings before a Disciplinary Hearing Officer (DHO) and during the hours they worked together in the ICI-O law library. Tr. Vol. 18, p. 104, l. 5 – p. 105, l. 7.

3. Plaintiff Hays was instructed not to assist male inmates housed at ICI-O with their lawsuits or other legal activities. Tr. Vol. 18, p. 158, ll. 3-7; p. 160, ll. 13-20. Gaylen Bodily, Warden at ICI-O in the fall of 1985, was present when Plaintiff Hays was instructed not to file lawsuits. Tr. Vol. 18, p. 149, l. 5 – p. 151, l. 19. On October 11, 1985, Plaintiff Hays filed a personal complaint in which a § 1983 claim was commenced against Warden Bodily, IDOC Director Al Murphy, the Idaho Department of Correction and J. Mendenhall. Defs. Ex. 4757. Also, while at ICI-O, Plaintiff Hays filed a § 1983 civil rights complaint on behalf of another prisoner alleging that IDOC failed to provide the prisoner adequate medical care, and filed two habeas corpus petitions on behalf of two male prisoners who claimed that they had been arbitrarily placed in detention. Tr. Vol. 1, p. 217, l. 20 – p. 21, l. 3; p. 218, ll. 4-6.

4. Within one or two weeks after filing the § 1983 claim and two habeas corpus actions, Plaintiff Hays was transferred from ICI-O to ISCI in Boise, Idaho. Tr. Vol. 1, p. 220, l. 1 – p. 221, l. 24. Warden Bodily was responsible for transferring Plaintiff Hays from ICI-O to ISCI. Tr. Vol. 15, p. 152, ll. 3-5. According to Warden Bodily, a prison rule existed which prohibited interaction between male

and female inmates. Tr. Vol. 15, p. 156, ll. 11-13; p. 159, ll. 14-15. Warden Bodily testified that the reason Plaintiff Hays was transferred was because he was attempting to assist female inmates with their legal issues as well as by demanding to work with and train the female law clerk. Tr. Vol. 15, p. 155, l. 11 – p. 156, l. 1; p. 165, ll. 8-13; p. 171, l. 25 – p. 172, l. 3.

5. While there may have been a prison rule prohibiting male and female inmate interaction, a review of the record indicates that Plaintiff Hays worked extensively and openly, under the direction of his supervisor Lieutenant Miller, with the ICI-O female law clerk. Further, the record indicates that Warden Bodily was present when Hays was directed not to file lawsuits on behalf of ICI-O inmates and that soon after filing complaints on behalf of such inmates, Plaintiff Hays was transferred.

Conclusion of law: The Court concludes that Plaintiff Hays was transferred from ICI-O to ISCI in retaliation for assisting fellow inmates in filing lawsuits against prison authorities and that while there may have been a valid prison rule prohibiting female and male inmate interaction, Plaintiff Hays' transfer was not based upon his attempts to work with and train the female law clerk or otherwise assist female inmates, but due to his assistance rendered to fellow male inmates in filing complaints on their behalf.

As a result, the Court concludes that a substantial motivating factor in Plaintiff Hays' transfer was his efforts in gaining access to the court system on behalf of fellow inmates and that such transfer on that basis is a

pretext and is not supported by a valid penological purpose.

ii) **Wayne Olds**

6. In 1993, inmate Wayne Olds filed a civil rights action against Correctional Officer Jay Green, Mail Room Officer at ISCI, asserting that Officer Green was illegally interfering with his mail. Pls. Exs. 212, 217. Further, inmate Olds challenged Warden Joe Klauser's and Director Richard Vernon's decision to close the ISCI law library as an unconstitutional denial of inmates' right to access the court system. Pls. Ex. 218. In addition to filing a civil rights action in federal court, inmate Olds sent Officer Green numerous inmate concern forms. Tr. Vol. 13, p. 248, ll. 1-11.

7. Officer Green became upset when he received an inmate concern form. Tr. Vol. 13, p. 248, ll. 10-11. While inmate Olds' concern forms did not upset him any more than when he received a concern from any other inmate, he received more concern forms from inmate Olds than from anyone else. Tr. Vol. 13, p. 248, ll. 10-18. Each concern form created more work for Officer Green which required him to either stay late or take work home. Tr. Vol. 13, p. 248, ll. 18-20.

8. Correctional Officer Connie McPherson[1] worked as a property room officer at ISCI from September 1989 to

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[1] The Court has carefully scrutinized the testimony provided by Officer McPherson as a result of her marriage to an inmate which occurred after the events she testified to. However, this relationship, standing alone, has not created a justification to find her testimony incredible in its entirety

December 1994. Tr. Vol. 10, p. 56, ll. 18-22. Because the property room was located next to the mail room and Officer McPherson worked as relief mail room officer, she interacted with Officer Green daily. Tr. Vol. 10, p. 57, ll. 607; p. 58, ll. 107; p. 59, l. 25. Officer McPherson observed that Officer Green would become upset when inmate Olds filed a concern form or grievance with him. Tr. Vol. 10, p. 59, 12-14. Officer McPherson observed Officer Green confiscating inmate Olds' mail and discussed inmate Olds' complaints about the mail with Deputy Warden George Miller, who she normally interacted with on a daily basis because Deputy Warden Miller supervised both the property and mail rooms. Tr. Vol. 10, p. 60, ll. 3-21.

9. Officer McPherson indicated that Deputy Warden Miller had grown tired of the many concern forms and grievances filed by inmate Olds. Tr. Vol. 10, p. 60, ll. 24-25. After inmate Olds continued to file concern forms and grievances, Deputy Warden Miller made the comment that he had to get rid of him. Tr. Vol. 10, p. 61, ll. 4-5. Correctional officers, and especially a deputy warden, have the power to influence the transfer process by recommending that certain inmates be transferred. Tr. Vol. 10, p. 19, ll. 6-17. There is no institutional rule prohibiting correctional officers from approaching a transport coordinator and recommending that certain inmates

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without independent evidence which provides grounds to discount her recollection of the events testified to. After reviewing the testimony offered in the instant action, the Court concludes that such that such independent evidence has not been produced which would entirely discredit McPherson's testimony.

be transferred. Tr. Vol. 10, p. 15, l. 17 – p. 19, l. 17. The more authority the correctional officer holds who attempts to influence the transport coordinator, the more likely it becomes that the request will be honored and the particular inmate transferred. Tr. Vol. 5, ll. 19-23. At times, the decision to transfer or re-assign inmates is entirely subjective. Tr. Vol. 9, p. 160, ll. 13-14.

10. On June 23, 1994, while inmate Olds was pursuing federal civil rights litigation, he was transferred from ISCI to ICI-O. Tr. Vol. 1, p. 89, ll. 5-6; Pls. Ex. 654C, at 3. Inmate Olds did not request a transfer and ultimately found that his transfer to ICI-O decreased his ability to pursue his civil rights action because all of his potential witnesses were housed at either ISCI or IMSI and he could not seek help from more senior and experienced inmate law clerks housed at ISCI. Tr. Vol. 1, p. 90, l. 22 – p. 91, l.2; p. 93, ll. 9-13. When inmate Olds requested information regarding the reason for his transfer, he was told that it was based on institutional need. Tr. Vol. 1, p. 92, ll. 11-13.

11. Officer McPherson discussed inmate Olds' transfer to ICI-O with Officer Green, who expressed elation. Tr. Vol. 10, p. 61, l. 24 – p. 62, l. 3. Officer McPherson also discussed inmate Olds' transfer with Deputy Warden Miller who told her that he had finally gotten rid of him. Tr. Vol. 10, p. 62, ll. 11-13.

12. In June 1994, many inmates from ISCI were transferred to ICI-O in order to fill bed space that had been created at ICI-O due to the opening of the Pocatello Women's Correctional Facility three months earlier. Tr. Vol. 9, p. 133, l. 20 – p. 134, l. 5; Vol. 15, p. 168, l. 25 – p.

169, l. 7. Inmate Olds was transferred to ICI-O in a group of approximately thirty-three people, which included two other plaintiffs in civil rights suits filed against IDOC. Tr. Vol. 1, p. 92, l. 23 – p. 93, l. 8.

Conclusion of Law: The Court concludes that inmate Olds' transfer to ICI-O was substantially motivated by his actions in pursuing civil rights litigation as well as accessing the institutional grievance procedure without any supporting penological purpose. While a legitimate penological purpose existed to transfer medium custody inmates, such as inmate Olds, to fill bed space at ICI-O due to vacancies created by the opening of the Pocatello Women's Correctional Facility, the Court concludes that Defendants simply fulfilled this institutional need by selecting a litigious inmate. Accordingly, the Court concludes that inmate Olds was subjected to retaliatory conduct due to exercising rights protected by the First Amendment.

iii) **Bob Jones**

13. In March 1996, Plaintiff Bob Jones was transferred from IMSI to ISCI and in February 1997 became a law clerk at the ISCI law library. In March or April of 1997, Officer Michelle Nelson became the Correctional Law Library Supervisor (CLLS) of the ISCI-law library. Tr. Vol. 9, p. 32, ll. 19-24. Plaintiff Jones confronted CLLS Nelson regarding her supervision of the library, her frequent absences, new rules that she instituted, violations of IDOC policy, and her failure to appear at scheduled appointments with inmates. Tr. Vol. 9, p. 33, l. 5 – p. 34, l. 1.

14. CLLS Nelson wanted Plaintiff Jones transferred to ICI-O because she felt she was being placed in a difficult position because Plaintiff Jones had been asked by a Deputy Attorney General to convince another inmate to accept a settlement offer from IDOC. Tr. Vol. 6, p. 182, ll. 9-16; p. 191, ll. 2-10; p. 198, ll. 13-21. CLLS Nelson wanted Plaintiff Jones transferred to ICI-O because she was afraid and felt threatened by him after she fired him from his position as a law clerk while at IMSI. Tr. Vol. 7, p. 96, l. 19 – p. 97, l. 12. CLLS Nelson had never known Plaintiff Jones to be anything other than a gentleman and indicated that he always made complaints to her in a diplomatic manner. Tr. Vol. 7, p. 98, ll. 8-15. Further, after Nelson fired Plaintiff Jones, although he became angry, he did not yell or threaten her in any way. Tr. Vol. 7, p. 98, ll. 16-25.

15. Deputy Warden Gary Barrier was Nelson's direct supervisor and met with her on a weekly basis. Tr. Vol. 7, p. 73, ll. 1-12. CLLS Nelson asked Deputy Warden Barrier to transfer Plaintiff Jones to ICI-O and she made some effort to have him moved. Tr. Vol. 6, p. 191, ll. 2-10; p. 198, ll. 1-8. IDOC did not have a rule prohibiting a correctional officer from influencing the transfer process by recommending that certain inmates be moved. Tr. Vol. 10, p. 19, ll. 6-17. CLLS Nelson acknowledged she may have told Correctional Officer Alvin Race that she was planning on asking Deputy Warden Barrier to transfer Jones to ICI-O. Tr. Vol. 6, p. 181, l. 12 – p. 182, l. 8.

16. CLLS Nelson told Officer Race that she knew someone in the transfer department and that she could have Plaintiff Jones transferred to ICI-O. Tr. Vol. 5, p. 43, ll. 12-15. Officer Race informed Nelson that having Jones

transferred was improper because he believed that Jones had a state habeas corpus action pending, however, Nelson was not willing to relent in her pursuit to effectuate the transfer. Tr. Vol. 5, p. 44, l. 21 – p. 45, l. 6. Officer Race also thought Jones should remain at ISCI because he was the most experienced law clerk and was an asset to the law library. Tr. Vol. 5, p. 50, ll. 11-16. Officer Race interceded on Plaintiff Jones' behalf by discussing the problem with Deputy Warden Barrier and, although Officer Race did not remember what Barrier told him about the transfer, Plaintiff Jones was not ultimately transferred to ICI-O. Tr. Vol. 5, p. 47, ll. 13-22. After CLLS Nelson learned that Jones would not be transferred, she became angry and very disappointed. Tr. Vol. 5, p. 52, l. 11 – p. 53, l. 14.

17. CLLS Nelson was disappointed that Plaintiff Jones was not transferred to ICI-O and she continued to try to have him transferred. Tr. Vol. 5, p. 45, ll. 6-7; p. 51, ll. 3-6. In June 1997, Officer Race informed Plaintiff Jones that CLLS Nelson had attempted to transfer him to ICI-O and that Nelson believed that it would be construed as a coincidence. Tr. Vol. 9, p. 34, l. 14 – p. 35, l. 3. In July 1997, a large number of inmates were scheduled to be transferred to a prison facility in Louisiana. Plaintiff Jones was not scheduled to be transferred. However, on the day of the group transfer, the dayshift corporal of Plaintiff Jones' unit, Corporal Williams, told Jones to pack his property because he would be transferred to Louisiana. Corporal Williams told Jones that he knew that he was not scheduled to be transferred but that he had just received an oral transfer order. Tr. Vol. 9, p. 35, l. 18 – p. 36, l. 3; p. 84, ll. 20-22.

18. On the way to the location where the inmates being transferred to Louisiana were ordered to report, Plaintiff Jones talked with Deputy Warden Barrier Jones, frustrated with the transfer order, told Barrier that he would have to explain the transfer to a judge. Tr. Vol. 9, p. 36, ll. 4-13. After all of Plaintiff Jones' property had been moved onto a truck for transport, Deputy Warden Barrier returned and informed Plaintiff Jones that he would not be transferred to Louisiana. Tr. Vol. 9, p. 37, ll. 5-12.

19. After the second attempted transfer, Plaintiff Jones determined that his work in the law library, especially being under CLLS Nelson's supervision, was detrimental so on August 1, 1997 he tendered his resignation effective August 15, 1997. Tr. Vol. 9, p. 39, ll. 2-7; p. 85, ll. 16-25.

Conclusion of law: The Court concludes that CLLS Nelson was substantially motivated in her attempts to improperly influence Plaintiff Jones' transfers to ICI-O and Louisiana by the complaints that he made regarding her supervision of the operations of the law library. The justifications offered by CLLS Nelson for her attempts to transfer Plaintiff Jones are pretextual. The court is of the opinion that complaints regarding the operation of a prison law library are unique in the prison context for purposes of this instant action. The complaints comprise speech which is designed to orally grieve potential impermissible intrusions upon the right to access the court system held by the individual inmates. Prison inmates thus should not be retaliated against by transfers for engaging in speech designed to orally grieve potential intrusions upon their right to access the court system.

Inasmuch as Plaintiff Jones was attempting to raise concerns regarding Nelson's operation of the law library and how it was affecting the inmates' right to access the courts, his speech was protected. The Court concludes that Officer Nelson's actions in attempting to transfer Plaintiff Jones as a result of those complaints are not substantially justified by any discernable penological purpose.

B. Reduction of Number of Law Clerks

20. Deputy Warden George Miller was assigned to supervise the ISCI law library in November 1988. Tr. Vol. 5, p. 152, ll. 11-15. He was aware that law clerks who worked in the law library routinely filed civil rights cases. Tr. Vol. 5, p. 182, ll. 10-15. When he assumed his responsibilities over the law library there were seven law clerks. Tr. Vol. 6, p. 12, ll. 13-14. Deputy Warden Miller testified that the number of law clerks that could probably handle the workload was six. Tr. Vol. 5, p. 178, ll. 23-24. It was understood by Deputy Warden Miller that an insufficient number of law clerks working in the law library created a risk that inmates would not be able to access the court system by filing lawsuits or pursuing pending cases. Tr. Vol. 5, p. 181, ll. 19-21. Despite the number of law clerks needed for the law library to function properly, Deputy Warden Miller decided to reduce the number of law clerks to four due to budgetary constraints. Tr. Vol. 8, p. 161, ll. 12-16.

21. Law clerks routinely left their employment at the law library for various reasons. Tr. Vol. 6, p. 13, l. 24 – p. 14, l. 19. After reducing the number of law clerks, the

number declined further to the extent that as few as two law clerk inmates were employed in the ISCI law library. Tr. Vol. 5, p. 179, l. 3 – p. 180, l. 19; *see also* Pls. Ex. 294. Deputy Warden Miller knew that the number of law clerks working in the law library fell below what was minimally adequate. Tr. Vol. 6, p. 13, ll. 11-19. Correctional Officer Tony Campa, ISCI Law Library Supervisor who worked under Deputy Warden Miller, indicated that although there was a high degree of turnover in the employees working as law clerks in the law library, there was no real problem in filling the vacancies and such vacancies could have been filled much faster. Tr. Vol. 12, p. 110, ll. 19-22; p. 112, ll. 8-11.

22. The Court finds that the number of law clerks decreasing to a number well below the minimum level was substantially motivated by a desire to prevent inmates' access to the court system. According to Defendants, the number of law clerks dropped to four due to budget constraints. The number of law clerks was allowed to decrease further because of an inability to promptly fill the vacancies, and due to the transfer of approximately 200 inmates to IMSI after its opening in November of 1989. Tr. Vol. 8, p. 93, ll. 1-8. While the primary reduction from six to four law clerk positions may have been due to financial constraints, the evidence of record does not support Defendants' justification for the further decreases.

Conclusion of law: The Court concludes that a substantial motivating factor in causing the decreased number of inmate law clerks at ISCI while Deputy Warden Miller was in charge of the library was to retaliate against the inmate law clerks, without a valid penological purpose, for their efforts directed at assisting inmates

accessing the courts. Further, the Court concludes that the reason provided for the decrease in law clerks below the necessary minimum number was not supported by evidence in the record.

C. Terminating Prison Employment

i) Patrick Hall

23. Plaintiff Patrick Hall began working as an inmate law clerk at the ISCI law library in 1987. Tr. Vol. 4, p. 147, ll. 13-16. Plaintiff Hall waited to file his first § 1983 civil rights claim against the state until the inmates on whose behalf the claims would be raised were able to proceed without his help because he feared that once he initiated a law suit against the Department of Correction he would be fired from his position as a law clerk or his parole date would be jeopardized. Tr. Vol. 4, p. 148, ll. 10-20; p. 149, l. 18 – p. 150, l. 14. Plaintiff Hall eventually filed three or four civil rights cases for other prisoners within approximately two weeks. Tr. Vol. 4, p. 150, ll. 15-18. Two or three weeks after filing these civil rights actions, Plaintiff Hall was fired from the law library. Tr. Vol. 4, p. 151, ll. 7-11.

24. Plaintiff Hall was fired by Stan Burris, a correctional officer assigned to the ISCI law library. Correctional Officer Burris told Plaintiff Hall that the decision to fire him was made by George Miller, Deputy Warden of Operations. Tr. Vol. 4, p. 152, ll. 6-16. The reason underlying Hall's firing was that a correctional officer had received a note written to Plaintiff Hall from another inmate offering to split the potential recovery in a case with Hall if he agreed to work on the matter. Tr. Vol. 4, p. 151, ll. 13. The identity of the correctional officer who

intercepted the note, the actual note soliciting legal representation, and the identity of the inmate who authored the note are not included among the evidence contained in the record before the Court. In sum, Defendants did not submit evidence to support their claim on the settlement sharing allegation.

25. Plaintiff Hall was not shown the alleged note, was not accused of soliciting the unidentified inmate's offer and was not issued a Disciplinary Offense Report (DOR) or warning regarding the incident. Tr. Vol. 4, p. 151, l. 13 – p. 152, l. 13. Deputy Warden Miller did not recall firing Plaintiff Hall, but indicated that he would have fired Hall under the circumstances testified to even if Hall did not know it would be illegal to share in any potential settlement. Tr. Vol. 8, p. 80, l. 25; p. 81, ll. 1-10.

26. Deputy Miller testified that the firing was justified because the information about a note offering a share in potential settlement would have come through security channels and they would have felt certain that the matter was significant. Tr. Vol. 8, p. 82, ll. 12-17. The record does not indicate whether Deputy Warden Miller ordered an investigation to be conducted.

Conclusion of law: The Court concludes that Plaintiff Hall's firing in such close proximity to the filing of at least three civil rights actions, together with the circumstances surrounding the proffered reason for the firing, create an inference that the firing was substantially motivated by Plaintiff Hall's attempts to access the court system on behalf of fellow inmates and is thus unsupported by legitimate penological goals. Further, the Court finds that credible evidence has not been produced which

supports the justification for the firing on the basis of an alleged settlement sharing arrangement and therefore concludes that Plaintiff Hall was wrongfully terminated as a law clerk in retaliation for the exercise of federally guaranteed rights under the First Amendment.

ii) Thomas Sanger and Carl Shively

27. In the summer of 1993, inmate Thomas Sanger began working as a janitor in the recreation department at ISCI. Inmate Carl Shively began working as a janitor in the ISCI recreation department in August of 1994. Inmates Sanger and Shively were supervised by Officer Frank Meo, who had been the recreation department coordinator since February of 1994. Tr. Vol. 12, p. 167, l. 25 – p. 168, l. 18. In February of 1995, inmates Sanger and Shively were on a work break when Officer Meo walked by. After inquiring into certain rumors that were circulating about the inmate welfare and recreation fund, Officer Meo indicated that he had concerns about the possibility of misappropriation and embezzlement of funds. Tr. Vol. 7, p. 151, ll. 7-19; p. 175, l. 25 – p. 176, l. 6. Inmates Sanger and Shively relayed their conversation with Officer Meo to inmate law clerks and each eventually signed affidavits documenting the contents of the conversation to be used in ongoing litigation. Tr. Vol. 7, p. 151, l. 22 – p. 152, l. 22; p. 176, l. 16 – p. 177, l. 2.

28. On February 27, 1996, the day after a hearing in the ongoing litigation involving allegations of embezzlement of the inmate welfare fund, Officer Meo informed inmates Sanger and Shively that they were suspended from their jobs at the recreation department and later told

them that they were fired for the statements they made in their respective affidavits. Tr. Vol. 7, p. 152, l. 19 – p. 155, l. 18; p. 178, l. 13 – p. 179, l. 10.

Conclusion of law: The Court concludes that inmates Sanger and Shively were fired from their positions as recreation department janitors in retaliation for submitting affidavits. The Court concludes that, although inmates Sanger and Shively did not have a protectable interest in maintaining their prison employment, their employment was terminated in such a manner as to infringe upon their right to participate in litigation designed to challenge alleged inappropriate IDOC conduct. Because the Court concludes that they were terminated as a result of their participation in ongoing litigation, and that there is no valid penological purpose justifying that employment determination, inmates Sanger and Shively were impermissibly retaliated against.

D. Interference/Disassembling of Legal Files

i) Lee Hays

29. Plaintiff Lee Hays had a greater quantity of legal material stored in his cell than IDOC policy allowed and he had discussions with correctional officers assigned to his living unit regarding his ability to keep the excessive amount of records. Tr. Vol. 2, p. 51, ll. 5-16. Plaintiff Hays sought court intervention to end the disagreements. Tr. Vol. 2, p. 51, l. 17. A stipulation was reached pursuant to which Plaintiff Hays was allowed to keep six boxes of legal materials in his cell. Tr. Vol. 2, p. 54, ll. 14-15. On September 15, 1989, Plaintiff Hays filed a motion in an ongoing action pursuant to which he requested he be

allowed additional hours of work in the law library. Defs. Ex. 694. The Department of Correction ultimately changed the law library schedule to allow Plaintiff Hays additional law library hours. Tr. Vol. 2, p. 138, l. 19 – p. 139, l. 1. In the latter part of 1992, Plaintiff Hays was rehired as a law clerk. Tr. Vol. 2, p. 57, ll. 10-14.

30. Shortly after Plaintiff Hays was rehired as a law clerk, he returned from detention to his cell to find that all of the metal fasteners he used to organize his numerous files had been removed and the files disorganized. Tr. Vol. 2, p. 57, l. 6 – p. 58, l. 5. Corporal Judy Lynn Cisney, assigned to Unit 13, had been told to remove the metal fasteners from Plaintiff Hays' files by a deputy attorney general while Hays was in detention and his files placed in storage. Tr. Vol. 15, p. 194, ll. 1-2. Corporal Cisney, acting under these orders, had removed enough metal to fill one half of a paper grocery bag. Tr. Vol. 15, p. 194, ll. 13-15. This activity took Cisney and two other correctional officers more than two days to remove the metal clips and fasteners from several boxes of legal papers. Tr. Vol. 15, p. 208, l. 25 – p. 209, l. 12. While Cisney remembers that she removed all paper clips, prongs and fasteners, she did not recall having removed staples. Tr. Vol. 15, p. 193, ll. 24-25. Plaintiff Hays had been sent to detention and after Cisney had taken possession of Hays' property to inventory it for storage, she removed the metal items after consulting with her superiors. Tr. Vol. 15, p. 194, ll. 6-12. After removing the metal items, Corporal Cisney took them to the law library. Tr. Vol. 15, p. 194, ll. 17-18. One day after Plaintiff Hays returned to his cell to find his files in this condition of disarray, all the metal fasteners, clips and items which

had been removed from his files were returned to him. Tr. Vol. 2, p. 67, ll. 1-10.

31. Corporal Cisney was instructed by her superiors to remove the metal fasteners from Plaintiff Hays' file because the original agreement which allowed Plaintiff Hays to store additional legal materials in his cell did not include office supplies provided by the State. Defs. Ex. 669. Defendants also assert that the removal of office supplies was supported by the legitimate penological purpose of keeping all metal items away from inmates who are sent to detention for security reasons and concerns. Tr. Vol. 19, p. 10, ll. 18-25. However, Plaintiff Hays' legal materials were not sent to him while he was in detention but were to be sent to storage until he returned to his assigned unit. Tr. Vol. 15, p. 197, ll. 5-10; Vol. 18, p. 127, l. 14. Lieutenant Steven Shayne did not see any penological reason to remove metal clips or fasteners from an inmate's legal material when the materials are placed in storage while the inmate is in detention. Tr. Vol. 19, p. 17, l. 11 – p. 18, l. 2.

Conclusion of law. The Court finds that a substantial motivating causative factor in the decision to remove all metal fasteners from Plaintiff Hays' legal materials was his prior activity in accessing the court system for the relief of his grievances. Further, the Court finds that such activity caused injury to, or chilled, Plaintiff Hays' ability to exercise his First Amendment rights which were consistent with his lawful incarceration. Finally, the Court concludes that while there is a valid penological purpose in prohibiting inmates in detention from possessing metal, that purpose, as applied in this instance to explain the decision to remove metal from Plaintiff Hays' files, is

pretextual. Therefore, the Court concludes that Plaintiff Hays was improperly retaliated against for exercising federally guaranteed rights and benefits.

E. Miscellaneous Incidents

i) Wayne Olds

32. While inmate Wayne Olds was working as a law clerk in the ISCI law library in 1993 a fellow inmate, Pat Wilson, entered the library and asked inmate Olds to assist him in preparing for an upcoming disciplinary hearing. Tr. Vol. 1, p. 69, ll. 7-8, 19-21. Correctional Officer Dennis Everett testified that he believed that part of the responsibilities of an inmate law clerk was to assist inmates in preparing for DOR hearings and that they did it all the time. Tr. Vol. 2, p. 187, ll. 2-6. Officer Everett could not think of a penological interest in prohibiting a law clerk from assisting an inmate to prepare for a DOR hearing. Tr. Vol. 2, p. 187, ll. 709.

33. Disciplinary Hearing Officer Kevin Castiglione ordered Inmate Olds not to assist inmate Wilson in preparing for his DOR hearing and threatened that if he did, he would be confined and receive a DOR. Tr. Vol. 1, p. 68, l. 24 – p. 69, l. 5.

Conclusion of law. The Court concludes that Officer Castiglione's order and threats to inmate Olds were motivated by inmate Olds' exercise of his protected right to assist other inmates and that no legitimate penological purpose was served. Therefore, the Court concludes that, based on the evidence contained in the record, Officer Castiglione unlawfully retaliated against inmate Olds.

ii) Michael McDonald

34. On January 15, 1996, inmate Michael McDonald wrote a concern form to Officer Roger Salzman who had prevented him from going to his job as a kitchen worker. Tr. Vol. 4, p. 60, ll. 12-23; Pls. Ex. 445, at 3968. In the concern form, inmate McDonald implied that the problem could be corrected if Officer Salzmann were to "drink a little more coffee in the morning, so you can wake up." Pls. Ex. 445, at 3969. Several days later, inmate McDonald received a DOR from Officer Salzman on the basis that the language used by inmate McDonald in his concern form was disrespectful. Tr. Vol. 4, p. 62, ll. 7-10; Pls. Ex. 445, at 3962. After receiving the DOR, inmate McDonald prepared and delivered a grievance to Sergeant Randy Anderson to forward the grievance to the appropriate place. Tr. Vol. 4, p. 66, ll. 5-8. Sergeant Anderson had signed off on the DOR issued to inmate McDonald by Officer Salzman. Tr. Vol. 4, p. 65, ll. 1-2; Pls. Ex. 445, at 3962.

35. After discussing the underlying events of the DOR as well as inmate McDonald's grievance, inmate McDonald felt intimidated and felt he was forced to withdraw his grievance. Tr. Vol. 4, p. 65, l. 4 – p. 66, l. 21. Further, after discussing the appropriateness of the DOR with DHO James Barker at his hearing, inmate McDonald again felt threatened that if he continued to challenge the DOR he would be subjected to increased punishment. As a result, inmate McDonald decided to plead guilty to the offense charged. Tr. Vol. 4, p. 66, l. 23 – p. 68, l. 8. Inmate McDonald's record contained the DOR and prevented him from moving to a more desirable cell assignment. Tr. Vol. 4, p. 72, ll. 6-11.

36. After pleading guilty to the DOR, inmate McDonald appealed the DOR to both IMSI Warden Joseph Klauser as well as IDOC Director James Spalding seeking to have the DOR expunged from his record. Tr. Vol. 4, p. 69, l. 15 – p. 71, l. 4; Pls. Ex. 445, at 3971-81. Inmate McDonald was told that he waived his appeal by pleading guilty. *Id.* IDOC policy precludes reprisals against an inmate that seeks relief through the established grievance procedure. Pls. Ex. 445, at 3963.

Conclusion of law. A prisoner's right to access the court system includes the ability to seek relief through established prison grievance procedures. Inmate McDonald attempted to seek relief through prison grievance procedures at three stages; inmate conce[illegible] form, grievance, and DOR hearing. The Court finds, and thus concludes, that the conduct of Officer Salzman, Sergeant Anderson and DHO Barker was motivated by inmate McDonald's accessing the grievance procedure and is without any penological purpose. Further, while pursuant to IDOC policy inmate McDonald had waived his right to appeal by pleading guilty, the Court notes and expresses concern that an investigation to determine whether illegal retaliation had occurred was not conducted even though prison administrators were faced with allegations clearly indicating that correctional officers had violated IDOC policy and conducted reprisals against an inmate who attempted to seek relief through established grievance procedures.

Meaningful review of grievances is an indispensable component of a prison grievance procedure, which in turn is part of an inmate's right to access the court system. Accordingly, the Court concludes that inmate

McDonald was retaliated against for his attempt to seek relief through the established grievance procedure and that Defendants were notified of the alleged retaliation but failed to conduct an investigation to determine whether their officers had retaliated or otherwise failed to take remedial action.

iii) **Alfredo Roman**

37. On February 9, 1996, Correctional Officer Gary White issued a memorandum to the inmate population housed at IMSI which indicated that the only materials which an inmate would be allowed to bring to the law library were legal materials related to the inmate's legal access to the courts. Defs. Ex. 1053. In the latter part of February 1996, Plaintiff Alfredo Roman began to maintain a log in which he recorded what he observed to be problems with the operation of the IMSI law library. Tr. Vol. 4, p. 7, l. 14 – p. 8, l. 1. Plaintiff Roman kept the log in a secured cabinet with only one key held by IDOC staff, including Officer White. Tr. Vol. 4, p. 8, ll. 3-15. In his log, Plaintiff Roman recorded his observations of Officer White reading legal documents before photocopying them. Tr. Vol. 4, p. 43, ll. 7-10. On June 24, 1996, Plaintiff Roman met with CLLS Michelle Nelson to complain about numerous violations of IDOC policy which had occurred in the IMSI law library during her tenure, many of which involved Officer White. Plaintiff Roman also informed her that he had not only been maintaining a log of such violations but that the log was missing from the secured cabinet. Tr. Vol. 4, p. 8, l. 20 – p. 11, l. 8. After raising these concerns with CLLS Nelson and returning to his unit, he was informed not to report back to the law

library because he had been placed under investigation. Tr. Vol. 4, p. 11, ll. 12-18. CLLS Nelson suspended Plaintiff Roman as a law library worker while he was under investigation. Tr. Vol. 7, p. 103, ll. 20-22.

38. Between June 25 and June 27, 1998, Officer White issued Plaintiff Roman two DORs after both he and CLLS Nelson conducted a search of Roman's law library desk finding personal letters, a photograph, a drawing, and a magazine which belonged to inmate Bob Jones, all of which were represented in the DOR to be in violation of the February 9, 1996 memorandum. Defs. Ex. 1059. The IMSI inmate law clerks were not instructed that the February 9, 1996 memorandum prohibiting inmates from bringing personal material to the law library applied to them. Tr. Vol. 4, p. 48, l. 24 – p. 49; l. 4; Vol. 9, p. 52, ll. 16-17. IMSI inmate law clerks openly possessed items in the law library after the February 9, 1996 memorandum which prohibited certain items from being brought into the law library, including photographs and pictures. Tr. Vol. 4, p. 14, l. 12 – p. 15, l. 11; Vol. 9, p. 51, l. 21 – p. 52, l. 7. Plaintiff Roman was not allowed to return to the law library or to assist fellow inmates with their legal matters while he was under investigation. Tr. Vol. 4, p. 53, l. 21 – p. 54, l. 4.

39. Officer White indicated that the purpose of the February 9, 1996 memorandum was to address the problem of inmates bringing too many personal items into the law library. Tr. Vol. 8, p. 19, ll. 17-25. Although the memorandum at issue clearly prohibits inmates from bringing coffee cups into the IMSI law library, Officer White indicated that the memorandum did not apply to coffee cups brought in by the law clerks. Tr. Vol. 8, p. 33, ll. 3-4, 18-23.

Officer White testified that he never observed personal items displayed on or near the desks of inmate law clerks, other than the items which prompted the issuance of the two DORs to Plaintiff Roman. Tr. Vol. 8, p. 20, ll. 16-24. This testimony is in clear conflict with all the other evidence that establishes inmate law clerks were allowed to possess personal items in the law library.

Conclusion of law. The Court concludes that Officer White issued the two DORs to Plaintiff Roman as a result of the complaint made to CLLS Nelson against him as well as his operation of the IMSI law library. In addition, the court concludes that the DORs issued by Officer White are not supported by a valid penological purposes, but rather were designed to inhibit Plaintiff Roman from pursuing further challenges to the operations of the law library.

IV.

APPROPRIATENESS OF INJUNCTIVE RELIEF SOUGHT

As a result of the instances of retaliation which have been established, Plaintiffs request the Court grant prospective injunctive relief designed to prohibit further retaliation for the exercise of federally guaranteed and protected rights. As previously discussed, in order to properly award prospective injunctive relief in the instant action, one of the representative plaintiffs must establish an injury due to Defendants' retaliatory activity. Additionally, the remedy must directly relate to the injury established.

In *Lewis v. Casey*, the Supreme Court indicated that an award of injunctive relief must be tailored to the level of constitutional violations actually established. 518 U.S. at 358, 116 S.Ct. at 2184. In order to grant system or class wide prospective relief, the injury established must be commensurate with the extent of actual violations. 518 U.S. at 358-59, 116 S.Ct. at 2184. Accordingly, in order to grant the relief sought by Plaintiffs, the Court must consider whether the retaliation actually established pervades the class of plaintiffs housed at ISCI and IMSI. In the Court's view, in order for a practice, policy or activity to pervade, the conduct would have to be widespread, permeate or be present throughout the entire class housed at the respective institutions.

In addition to limiting the award of prospective relief to the instances of retaliation which pervade the class, the Court must also consider the requirements of the PLRA. With respect to an award of prospective relief, the PLRA provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C § 3626.

In addition to these considerations, the courts are "ill equipped to deal with the increasingly urgent problems of prison administration and reform" and "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Martinez*, 416 U.S. at 404-05, 94 S.Ct. at 1807, *rev'd on other grounds*, 490 U.S. 401, 411, 109 S.Ct. 1874, 1880 (1989). The Court is aware of its role in protecting the rights held by all citizens, as well as those rights which Plaintiffs continue to hold even though incarcerated. It is the irreversible and continuing role of the courts to determine when a federally guaranteed right has been infringed upon and, to the extent that such a right has been deprived, it is the courts that must fashion appropriate relief. Thus, in determining the appropriateness of relief in the instant action, the Court has considered when relief is appropriate, how relief must be tailored when conditions of prison confinement are challenged and the Court's role in protecting and preserving federally guaranteed rights.

The Court concludes that prisoners held at IMSI and ISCI have been subjected to unlawful retaliatory conduct as set forth in the Findings of Fact and Conclusions of Law sections. This retaliatory conduct has taken the form of prison transfers, firing inmates from prison employment, disassembling of prisoner's files, and the other retaliatory actions discussed above in the preceding sections.

With respect to inmates being fired from prison employment and the other instances of miscellaneous retaliatory conduct, the Court concludes, after careful and deliberative review, that a showing has not been made

that such retaliation pervades the entire class of plaintiffs housed at ISCI and IMSI sufficient to warrant a grant of prospective relief in the instant class action.

However, the Court is concerned about the injuries caused by retaliatory transfers resulting from the exercise of protected rights. The Court notes that IDOC officials testified at trial that they have not created a rule which prohibits individual officers from improperly asserting influence upon a transfer coordinator in order to include a burdensome and litigious inmate on the list of inmates that are to be transferred. Based upon the evidence presented at trial, the Court has concluded that the absence of a rule prohibiting retaliatory transfers has allowed such retaliation to occur. However, the absence of a prison rule prohibiting unconstitutional conduct does not support an award of prospective injunctive relief absent evidence that the unconstitutional retaliatory transfers pervade the class of plaintiffs housed at IMSI and ISCI. The Court has found that three inmates have been subjected to unconstitutional retaliatory transfers between 1985 and 1997. Therefore, the Court must limit its review in determining whether prospective injunctive relief is appropriate in light of the instances of injury which have been established by the evidence.

The Court is of the opinion, and so concludes, that based upon the extent of retaliatory transfers actually established, prospective injunctive relief is inappropriate because such unlawful transfers have not been shown to pervade the class of inmates housed at IMSI and ISCI. Although the Court has determined that prospective injunctive relief is inappropriate, the Court is of the opinion that in order to prevent future retaliatory transfers,

Defendants should create a policy or guideline which prevents a correctional officer from exerting influence upon those given the responsibility to determine which inmates are to be transferred. The Court concludes that in order to prevent future retaliatory transfers from occurring, the criteria used to determine which inmates should be included in potential transfers should be primarily objective. Once a list of inmates who qualify for objective consideration is compiled, then to the extent that subjective considerations are taken into account, those considerations should not be premised, in any degree, upon that inmate's activity in accessing the court system. However, subjective considerations should never be used to add an inmate's name to a transfer list when that inmate did not qualify for the transfer based upon purely objective considerations. The Court is of the opinion that too much weight has previously been given to inappropriate correctional staff influence and considerations based upon the litigious nature of an inmate when creating transfer lists. However, the Court concludes that Plaintiffs have not established class wide injury in order to support an award of class wide prospective injunctive relief. Accordingly, the Court finds and thus concludes that prospective relief is inappropriate.

V.

SUMMARY AND OVERVIEW

By way of overview, the conduct, actions and events which the Court determined were retaliatory acts were not malicious, mean spirited or imposed in an oppressive

manner. As noted at the outset, certain individual correction officers' conduct lacked basic human or social courtesy, was rude and unacceptable behavior even though not rising to the level of retaliatory acts. However, it is very clear that during this entire litigation Defendants have attempted to trivialize virtually every claim made by Plaintiffs, including those several incidents which were in fact retaliatory in nature and did not advance legitimate penological goals. Those several isolated incidents which the Court has determined were in fact retaliatory acts violated the principles of law and guiding standards carefully set forth in Section II and contained on pages 2 through 12 of this Order. Violation of those legal standards occurred in this action and, while not pervading the entire class, were indeed violations of protected rights.

The underlying legal principles guiding this Court are not of its own making, but are well established and controlling authorities and directives from the highest appellate courts. Those legal principles make it clear that prisoners have a constitutional right to access the courts, or assist others in accessing the courts, without fear of retaliatory transfers, loss of employment or housing, dismantling of inmates' legal files, unreasonable reduction in library or law clerk assistance, and other such events that are not based on advancing legitimate penological goals. In those several instances set forth herein, those legal principles were violated and retaliation occurred. Nonetheless, those acts of retaliation were isolated instances over a period of many years and did not pervade the entire class, as contemplated and required by

controlling case law set forth herein. Therefore, prospective injunctive class-wide relief is not appropriate.

VI.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED:

1. Plaintiffs' prayer for declaratory relief indicating that inmates housed at the Idaho Maximum Security Institution and the Idaho State Correctional Institution have been subjected to instances of unlawful retaliation is GRANTED.

2. Plaintiffs' prayer for prospective injunctive relief is DENIED.

SO ORDERED this 16th day of March, 1999.

/s/ Larry M. Boyle
LARRY M. BOYLE
UNITED STATES
MAGISTRATE JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document was transmitted via U.S. Mail to the following named persons:

Stephen L. Pevar, Esq.
1888 Sherman Street, Suite 380
Denver, Colorado 80203

Howard A. Belodoff, Esq.
Box 913
Boise, ID 83701

Stephanie Altig, Esq.
Deputy Attorney General
Statehouse Mail
Boise, ID 83702

Dated: _____

CAMERON S. BURKE, CLERK

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al., Plaintiffs, v. JAMES C. SPALDING, et al., Defendants.	Case No. CIV 91-0299-S-LMB JUDGMENT (Filed Mar. 22, 1999)

This action came on for trial before the Court, Honorable Larry M. Boyle, United States Magistrate Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

Based upon the Findings of Facts, Conclusions of Law, Memorandum Decision and Order entered on March 16, 1999, it is Ordered and Adjudged that Plaintiffs be awarded a Declaratory Judgment decreeing that Defendants have engaged in unlawful retaliation agaist members of the class of inmate Plaintiffs while such inmates were engaged in the pursuit of federally guaranteed rights, but prospective injunctive relief is denied because the retaliatory conduct occurring was not sufficiently pervasive to warrant relief.

Dated at Boise, Idaho, this 22nd day of March, 1999.

CAMERON S. BURKE
Clerk of Court
by
G. Briggs, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al., Plaintiffs, v. JAMES C. SPALDING, et al., Defendants.	Case No. CIV 91-0299-S-LMB AMENDED JUDGMENT (Filed Aug. 17, 1999)

The Court, having reviewed the proposed remedial plans submitted by the respective parties, enters the following Amended Judgment which incorporates the language of the original Judgment dated March 22, 1999 (Docket No. 609).

After reviewing the proposed remedial plans, the Court concludes that neither is entirely necessary or appropriate. The Court had previously expressed concern regarding the failure of IDOC to implement a policy designed to prevent unlawful actions relating to the transfer of inmates. However, the Court has no intention of overseeing prison inmate transfer operations to the extent requested by Plaintiffs.

Rather, the Court concludes that instead of implementing an all-encompassing plan for prospective conduct, injunctive relief will be granted which defines the deficiencies in the present transfer policy and will prohibit specific actions in the process of selecting inmates for prison transfers. To this extent, the Court is satisfied

that the relief granted herein is narrowly tailored to prevent future deprivation of constitutional rights and unlawful retaliatory conduct to the identified individuals involved herein.

This action, having been duly tried and a decision rendered, based upon the Findings of Fact, Conclusions of Law, Memorandum Decision and Order entered on March 16, 1999, and as amended by Order dated June 17, 1999,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs be awarded a Declaratory Judgment decreeing that Defendants have engaged in unlawful retaliation against members of the class of inmate Plaintiffs while such inmates were engaged in the pursuit of federally guaranteed rights. However, prospective class-wide injunctive relief is denied because the retaliatory conduct occurring was not sufficiently pervasive to warrant relief.

However, individual injunctive relief is appropriate and will be granted to the extent that Defendants shall be required to expunge all references to the Disciplinary Offense Report issued to Plaintiff Alfredo Roman which the Court determined was retaliatory, as well as to amend and clear the inmate institutional files of inmates Thomas Sanger and Carl Shively of all record, notation, history or referencing to their firings which the Court has determined and declared were unlawful and retaliatory, and also to ensure that these inmates suffer no adverse consequences relating to their employment and pay level to which they may be entitled in the future.

Further, inmate Plaintiffs Lee Hays, Bob Jones and Wayne Olds shall be awarded prospective individual

injuncitve relief to the extent that Defendants are prohibited from allowing individual officers to influence or attempt to influence any transfer coordinator or any other IDOC staff member given the responsibility to determine which inmates are to be transferred or to move these inmates as a result of the exercise of their federally guaranteed rights. Accordingly, Defendants shall not be allowed to transfer these specific inmates unless a transfer list has independently been created based upon purely objective criteria. Once a transfer list of inmates who qualify for objective consideration is compiled by the institution, then subjective considerations may be taken into consideration as to whether these inmates, i.e., Hays, Jones and Olds, are to be included in any transfer. However, the ultimate decision to transfer these specific inmates may not be premised in any degree upon their individual activity in accessing the courts. Accordingly, Defendants are strictly prohibited from using subjective considerations to add these specific inmates to a transfer list when they did not qualify for the transfer based upon purely objective considerations.

SO ORDERED this 17th day of August, 1999.

/s/ Larry M. Boyle
LARRY M. BOYLE
UNITED STATES
MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document was mailed to the following named persons:

Stephen L. Pevar, Esq.
1888 Sherman Street, Suite 380
Denver, Colorado 80203

Howard A. Belodoff, Esq.
Box 913
Boise, ID 83701

Paul R. Panther, Esq.
Deputy Attorney General
Statehouse Mail
Boise, ID 83702

Chas. F. McDevitt, Esq.
Box 2564-83701
Boise, ID 83702

Rex Blackburn, Esq.
Box 959
Boise, ID 83701

Margaret Winter, Esq.
ACLU National Prison Project
1875 Connectict Ave NW #410
Washington, DC 20009

Dated: _____

CAMERON S. BURKE, CLERK

By _____
Deputy Clerk

ALAN G. LANCE
ATTORNEY GENERAL

TIMOTHY R. McNEESE
STEPHANIE A. ALTIG
PAUL R. PANTHER
TIMOTHY D. WILSON
Deputy Attorneys General
Idaho Department of Correction
1299 North Orchard St. #110
Boise, Idaho 83720
Telephone (208) 658-2097
ISB Nos. 2589, 4620, 3981, 2936

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al., Plaintiffs, v. **JAMES C. SPALDING, DAVE PASKETT, JOE KLAUSER** Defendants. And **TIMOTHY R. McNEESE** and **STEPHANIE ALTIG,** Attorneys	**Case No. CV91-0299-S-LMB** **(Ninth Circuit Docket No. 99-35930)** **AMENDED NOTICE OF APPEAL** (FILED OCT. 1, 1999)

Amended Notice is hereby given that the Defendants and attorneys in the above named case hereby appeal to the United States Court of Appeals for the Ninth Circuit

from the following judgments and orders entered in this action:

1. Injunctive Relief Ordered in the Amended Judgment Dated 8-17-99, Docket #710;

2. Findings of Fact, Conclusions of Law, Memorandum Decision, And Order Dated 9-13-99, Docket #718.

RESPECTFULLY SUBMITTED this 1st day of October, 1999.

STATE OF IDAHO
OFFICE OF THE
ATTORNEY GENERAL

/s/ Timothy D. Wilson
TIMOTHY D. WILSON
Deputy Attorney General
Counsel for Defendants,
McNeese and Altig

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 01 day of October, 1999, I mailed a true and correct copy of the AMENDED NOTICE OF APPEAL to:

STEPHEN L. PEVAR
ACLUF
1888 Sherman St. Suite 380
Denver, Colorado 80203

and

MARGARET WINTER
ERIC BALABAN
ACLUF National Prison Project
1875 Connecticut Ave. NW, Suite 410
Washington, DC 20009

and

HOWARD BELODOFF
2402 W Jefferson
Boise, Idaho 83702

via the U.S. mail.

/s/ Janene Hocking
JANENE HOCKING

United States District Court
District of Idaho
Boise, Idaho

NOEL GOMEZ, et al, Plaintiffs, vs. RICHARD VERNON, et al, Defendants.	)	Docket No. CV-91-0299-S-LMB Boise, Idaho February 19, 1998 8:00 a.m.

COURT TRIAL – DAY 9

THE HONORABLE LARRY M. BOYLE PRESIDING
UNITED STATES MAGISTRATE JUDGE

* * *

JONES – DIRECT

[35] him about that, and he said, well, it'll just be marked down as coincidence, is what she told him. Just another coincidence, was his exact words.

Q A few weeks later in July 1997, did something else happen to you concerning a transfer?

A Yes.

Q Will you describe what happened in July 1997?

A A substantial amount of inmates had been scheduled that day to be moved to Louisiana, and they came through with the list of who was going to be moved at 8:00 o'clock that morning, or 7:30. And they informed everybody who was going to move, they slipped a letter

under their door, and told them to get ready and start packing their things up, slid 'em boxes and that type of thing. And they got through the whole tier, and I wasn't one of the ones that was going. But all of us remained locked down until they could get these people in isolation.

Well, the people on our tier packed up and left, and about 10:30 that morning, long after everybody else had left, the corporal came down, the dayshift corporal, and said to me, Jones, pack your stuff up, you're going to Louisiana. I said, well, I wasn't on the list. He said, I know you weren't on the list, but I just got a call from up front. I said, from who up front, and he said, you don't need to know that, all you need to know is I want you to get your stuff packed and I [36] need you to be over there in seven house by the time count time comes, which was about thirty minutes away, at 11:00 o'clock.

So, I began to pack up as rapidly as possible my stuff, threw it in a laundry cart and pushed it over to seven house, to the isolation area there. And on the way I bumped into Gary Barrier, the deputy warden of operations, and as I was going by him he said to me, well, just another luck of the draw. I just snapped and I turned around to him and I said, you know what, this is the last time you'll ever do this to me. And I said, I'll be back and you and I are going to be sitting in a courtroom, and you're going to get a chance to explain all these coincidences to a judge.

And he backed up a little bit and he looked me and he said, well, I didn't have nothing to do with this. And I said, I don't believe you, I don't trust you anymore, you

or Nelson. You all know I didn't meet the criteria for this move, I wasn't even on the list, why am I being moved. He just shrugged his shoulders and I went on inside after that, and it was within a few minutes he came back into the unit to talk to me. And he said, what makes you think you don't meet this criteria.

By then I was so angry, because they were telling us that we had to send out all of our stuff, our TV's, radios, and books, et cetera, that I just said, you know, get away from [37] me, I don't like you, I don't want anything to do with you. And he said, chill out. And I said, you know, I'm trying to, but you keep following me around trying to talk to me and I don't want to talk to you, just leave me alone.

He said, well, I'm going to go up front and check on this. So, he left the unit. And probably an hour or so later, they had all my stuff on the truck ready to ship, and me in an isolation cell, and he returned and he said, unpack your stuff, you're not going. He says, as a matter of fact, put your stuff in this cart, I'm going to help you push it back over to eight house, you're going right back to the same cell you came out of.

Q Did you – did you speak with Michelle Nelson about your having nearly been transferred to Louisiana?

A The next day I went to work, and I immediately went up to her. She was inside the bubble, which was a glassed-in room. She stood the window open, and I said, what's your problem. I said, you know, I don't know what I've done to you, but I certainly haven't done anything to you over here, and you have no reason to be doing this to me. I said, and you know, that's twice now

you've tried to move me out of here. You know I've got my own personal case going and other peoples' cases, what's the problem. I said, I thought you and I agreed that this wasn't going to happen anymore.

And she looked at me and she said, I had nothing to do [38] with this. And I said, I know for a fact – well, by then I was so angry that I said to her, I know for a fact that you tried to transfer me to Orofino. And she said, yeah, I did, but I didn't have anything to do with this Louisiana move. I said, well, I'm not sure that I believe you. It seems like every time I get around you, I get transferred or rolled up, or something happens.

And we left it at that, because I wasn't getting anywhere and I didn't really want to get in trouble over it.

Q Did there come a time when you –

A Oh, she showed – I'm sorry – she showed me the list, the move list, and said, look, you weren't even on the move list, how could I have anything to do with this, and she showed it to me.

Q Did you, thereafter, get any information about what had happened between the time you first spoke to Barrier and the time that he came back and told you that you weren't going to be transferred?

A One of the other law clerks, I believe it was Marq Bartlett, told me that he had called Steven, and Steven had called Mr. McNeese, and McNeese had, at Steven's insistence, had intervened.

Q Steven Pevar?

A Pevar.

Q Did there come a time when you stopped working as a law [39] clerk at ISCI?

A Well, after that episode – after that episode, that was in July, and within a couple of weeks it just seemed to me that there wasn't any use in my staying there. And actually, I was doing myself harm, because I was underneath her supervision. So, I turned in my resignation on the 1st of August and I left on the 15th.

Q After you were transferred to ISCI, did you make any efforts to get back to the law books and the legal files that you had been – that you had had to leave at IMSI when you were transferred?

A I made several.

Q During what period of time?

A I was still making them clear into the end of that year. But, originally, the first effort I think I made was with Jim Barker. And when he came over and he dismissed the DOR, he was the hearing officer, we discussed afterwards some of the problems I was having getting my things back. And he offered to help, he offered to see what he could do. And so I sent him a letter, along with I think some receipts that I still had, or that I had sent in since then.

And then, the second contact I had with anybody was Ms. Shields was on the yards one day and I was out working, and she stopped and talked to me. And she offered to help. And I think at that time I don't think I took her up on her offer.

* * *

[84] wasn't a particular case, unless it was *Gomez*, which involved the law libraries, and then – and by – and by that very nature, her interaction with the law library. It was – I was a pain in the neck to her. I mean, there's this – there's this little voice that's saying, where were you when these guys were sitting there waiting for you for two hours yesterday, and it is annoying – some administrators can accept that kind of comment, others can't. And Ms. Nelson couldn't. I mean, I could say these things to Ms. Shields and she didn't get – she didn't try to have me transferred, or throw her hands up in the air or anything. She just told me what she thought, and then if – and if I lost, I lost the argument. That's the way it was.

But, this is a different person and – that you're dealing with with her, and she just – when I would say these things it angered her. And the best way to get rid of it was – to shut me up was to get me out of there.

Q You were angry too, weren't you, Mr. Jones? Still are?

A Absolutely. Certainly, I am.

Q Who was the corporal that notified you of the Louisiana move?

A Williams. He's now a sergeant at ISCI.

Q You stated that you ran into Deputy Warden Barrier?

A Yeah, unfortunately for him.

Q And you said words something to the effect of this is the [85] last time you'll ever do this to me?

A Yeah, I was tired of it.

Q You'll be explaining this to a judge?

A Yes.

Q How often do you threaten prison officials with lawsuits, Mr. Jones?

A That's the only time I've ever done that. I had just finally reached the limit of what I was going to tolerate in back door stabbing and putting peoples' – taking peoples' things away from them, not following in their own policies, making up the rules as they go along.

Q It got you what you wanted, didn't it?

A What was that?

Q Not to be moved to Louisiana?

A Well, if it did, then I'm glad that I said it.

Q You eventually quit your job assignment as a law clerk at ISCI. When was that?

A I gave them two weeks notice on August 1st, and I left on August 15th.

Q And why did you leave?

A Because I just didn't want to be subjected to her control anymore.

Q Wasn't it because you had just gotten ready to file a lawsuit against Michelle Nelson?

A Well, that was part of it, yes.

[86] Q And you did file –

A Yes, that was a –

Q – that case, right?

A Yes, I did.

Q It's pending –

A And I didn't think it was –

Q – right now, isn't it?

A Yes. And I didn't think it was fair to her, to be honest with you, to be in her employ at that time, once I –

Q And you didn't –

A – had done that.

Q – file any grievances about Michelle or pursue any other administrative remedies before you filed that case, did you?

A The 1983?

Q Yes.

A I didn't file any formal grievances, but I talked to people all the way up to and including the warden about the problems, and they never got resolved, and I finally just got tired of it. And in that time, that was before PLRA changed, and the exhaustion rule wasn't in – I didn't feel like I had to exhaust, until all of a sudden PLRA came into effect. And then, the story changed. Or I would have been documenting things better.

THE COURT: Ms. Altig, we'll take our morning recess. We'll be at a quarter past the hour.

* * *

KLAUSER – DIRECT

[114] MR. McNEESE: Objection on relevance and especially this overpopulation matter.

THE COURT: Okay. Two things. First, Mr. Klauser, be sure you speak right up into the mic. We need to make sure we make a record. Secondly, the objection as to relevance, what is the reason for talking about five hundred beds and so forth? I can understand the reason in his background, but what does the new living quarter number have to do with this action?

MR. PEVAR: Well, once again, I now need to reveal what I'm –

THE COURT: Well, are you representing to me that you'll tie this into –

MR. PEVAR: Yes.

THE COURT: – the retaliation claims?

MR. PEVAR: Yes.

THE COURT: All right, let's see where it goes.

MR. PEVAR: Thank you, Your Honor.

BY MR. PEVAR:

Q All right, under the *Balla* ruling, the population was capped at around seven what?

A Effectively seven hundred and eighty-five inmates.

Q Okay. And it remained at seven eighty-five, more or less, from 1984 until these new living units were opened up, correct?

[115] A I can't speak prior to January of '92, but since January of '92 it was more or less seven hundred and eighty-five.

Q Okay. Isn't it true that in early – or, in July 1995, and you may not know the exact month, that IDOC filed a motion in the *Balla* case, seeking permission to modify that cap?

A The department moved to modify that cap, yes.

Q Yes. And you were the warden at ISCI?

A That's correct.

Q You were – you were attempting to add how many beds to the existing buildings?

A I cannot recall the number, but it was taking housing units to two hundred percent of their design capacity. And I simply can't recall the numbers involved.

Q Okay.

A I believe it was in the neighborhood of a hundred and fifty, or thereabouts.

Q Do you – do you recall the fact that you were attempting to increase ISCI's population by about twenty percent, and a hundred and fifty, I think, is around twenty percent of the seven eighty-five?

A We were attempting to raise the population to accommodate the growth within the state of Idaho by

what I perceived at the time to be a manageable and reasonable number. Whatever the percentage was –

Q No, I do –

[116] A – whatever the number was.

Q No, I do understand that, but that wasn't my question. So, it was about a twenty percent increase?

A Again, I don't recall the number.

Q Okay.

A But it was double-celling of houses that – under housing units that under *Balla* were capped at a hundred and fifty percent of design capacity.

Q And you and Director Spalding spent quite a bit of time, didn't you, drafting that plan?

A I did, my staff did research.

Q Now, given that *Balla* was a pro se case, handled by the law clerks, do you recall that in 1995, when the State filed its motion to modify, that the one person it served a copy of its pleadings was David Nyberg?

A Could you restate the question?

Q Do you recall – first of all, you know that the *Balla* litigation was handled entirely by law clerks?

A Hm-hmm.

Q There were no attorneys representing the inmates? Do you recall that?

A I remember in the court proceeding that there were attorneys present.

Q In which court –

A And they –

[117] Q In which court proceeding?

A In the *Balla* case.

Q You mean the one that you and I were involved in?

A Right.

Q Right. No, I'm talking about in 1984?

A Oh, no, I have no knowledge.

Q Okay. The attorney general's office has already brought out that Mr. McNeese served David Nyberg, okay. And he – and Mr. Nyberg was serving in that – in his capacity as lead law clerk at that time, wasn't he?

A I don't know that.

Q Okay.

A I know that he was involved. I don't know what his capacity was.

Q Now, you have just indicated that I became involved. Do you recall that not long after the department filed its motion to modify in *Balla* that I came down, I met with you, Mr. McNeese was there, and we reviewed your plan in some depth?

A Yes, sir.

Q You had a chart, and you were showing where you were going to double-cell the single cells and – correct?

A I recall meeting with you, going on a tour of the institution.

Q Right.

A Yes, sir.

[118] Q And you explained how in your opinion and in the opinion of the department, that you could increase by twenty percent the people at that institution without that having any severe consequences, like a domino, on water and sewer, the law library, the medical services, the education department, laundry, the gymnasium. You had – you had already thought this out and you were explaining to me why you thought the plan would work, correct?

A I'm sorry, I didn't hear a question in there. Was there a question there?

Q Yes. You thought that that plan would work, how you could increase by twenty percent and not have any severe adverse consequences?

A Yes.

Q Now, the prisoners disputed that plan and your claims, is that right?

A The [sic] took exception with it, yes.

Q Okay. And we went to a hearing, and that's the hearing that you talked about?

THE COURT: You'll have to answer audibly.

THE WITNESS: Yes.

BY MR. PEVAR:

Q Okay. The hearing took place on September 5th, 1995. I don't know if you remember the date?

A No, I don't.

[119] Q Okay. You were present at the hearing?

A Yes.

Q Do you recall that there was just one inmate who sat at counsel's table with me?

A I remember that Inmate Nyberg was there; I don't know that he was the only one.

Q Now, I cross-examined Director Spalding for quite a while that day, do you recall that?

A Yes.

Q Okay. We went over the plan that the department had offered to the Court?

MR. McNEESE: Objection; relevance. It calls for hearsay.

THE COURT: Well, where are we going? It seems to me like we're talking about things other than retaliation at this point.

MR. PEVAR: Your Honor, if you'll give me just two more minutes, what – and if you now want me – you know, if I –

THE COURT: Yeah, I want to get right into retaliation. Let's get right to it, because I – because what I've heard so far may be foundational or developmental,

but I want to real quickly get to what the issue is before us today.

MR. PEVAR: Okay.

[120] BY MR. PEVAR:

Q Warden Klauser, the department lost that motion, didn't it?

MR. McNEESE: Objection; that calls for a legal conclusion.

BY MR. PEVAR:

Q Well, it was withdrawn, you didn't – you weren't able to implement your plan?

A I'm not familiar with the terms of actually what happened, but we did not proceed with the plan.

Q And David Nyberg singlehandedly was responsible for that?

MR. McNEESE: Objection; that calls for a legal conclusion as well.

THE COURT: I'll require some foundation.

BY MR. PEVAR:

Q Warden Klauser, you knew, and we had discussed the fact, that I had gotten involved only because of David Nyberg, that David Nyberg had been served by the attorney general's office, that he's the one who contacted me, and that that's why I was there?

MR. McNEESE: Objection; now counsel is testifying.

THE COURT: Sustained.

MR. PEVAR: Let me just ask another couple background questions if I may, Your Honor?

* * *

[126] rather than from counsel.

BY MR. PEVAR:

Q Isn't it true that as a result of not being able to increase the beds right in your own buildings, that you now had to spend extra money in order to transport people elsewhere?

A I don't know what other options were reviewed, but at sometime after the – that decision, the State was – the department was compelled to house people out of state.

Q Do you remember all of the media attention that the department got when it lost that motion, because – isn't it true that even you were interviewed, as well as Director Spalding, essentially how did the department get itself into this mess?

A I guess the answer to that question is no, I don't recall there being a disproportionate amount of media attention given to it, and no, I was not interviewed.

Q From that day forward, September 5, 1995, David Nyberg was a marked man, wasn't he?

MR. McNEESE: Objection; argumentative.

THE COURT: Overruled.

THE WITNESS: No.

BY MR. PEVAR:

Q Do you think it's just a coincidence that David Nyberg was fired from his law clerk position three weeks after that

* * *

[193] seen fabricated or false DOR's. Have you also?

MR. McNEESE: Objection; I don't believe that Deputy Warden Miller testified to those exact words.

THE COURT: Well, he's characterized it as such. That'll go to the weight, and he may examine on that. Go ahead, Mr. Pevar.

BY MR. PEVAR:

Q Have you also?

A I don't know that I have.

Q You might have, you're just not sure?

A I don't – I don't think I have.

Q It's your contention though, that even – that despite the fact that you can't think of a single investigation, you can't think of a single discipline, that my clients ought to have faith in your grievance system?

A I have terminated and disciplined staff for matters that were brought to my attention by inmates.

Q Nothing to do with their legal work though?

A Not that I can recall.

MR. PEVAR: I have no – just –

BY MR. PEVAR:

Q Warden Klauser, isn't it true that the first step of the grievance system is to file a concern against the officer about whom you're complaining?

A I didn't hear the conclusion to that sentence, but the [194] grievance process calls for –

Q If you didn't hear it, then let me repeat it.

A Okay.

Q Because I certainly want you to answer my question. The first step of the grievance process is to file a concern, what's called a Concern Form, right?

A Effectively the first step is to attempt to resolve it informally with the person most directly involved.

Q Okay.

A And if that's verbally, or by filling out a Concern Form, however it's done.

Q So, in order for these retaliation grievances to even reach you, the inmate has to reveal to the person who he's claiming retaliated against him that he's filing a grievance?

A If the party most directly involved does not respond, then it's incumbent upon the inmate to file a formal grievance, which comes directly to my office.

Q Let me repeat the question, because I – I can't match your answer to it. The question was, isn't it true that in order to initiate the grievance process in claiming a retaliation, you first have to start with the very officer who you're claiming retaliated against you?

A The first step is to – not necessarily the officer. If there's a conflict you could go – for example, if it's a housing unit officer, you could go to the sergeant –

[195] Q Are you –

A – and that's often done.

Q Okay. Are you positive that that's the case, that indeed you're not supposed to go to the officer who is directly involved?

A I think that my – I can't quote the policy, but I can quote – I can tell you how I interpret it, and that's to address the issue with the person most directly involved, or at the lowest level, I think is the way I put it. And –

Q Okay, And so, if – .

A – so if it – if you have a conflict with the officer, you could address it with the sergeant of that unit, for example.

Q Have you announced this fact to the inmates, because I think your policy says something different?

A I think it's in the handbook that everybody gets and receipts for.

Q All right. So, if an inmate – let's say if a law clerk believes that an officer is subjecting him to retaliatory pat searches, it's supposed to go to that officer first, right, the one who's doing it?

A The officer or the sergeant in the unit, if it's appropriate.

MR. PEVAR: That's all I have, thank you.

THE COURT: Thank you, Mr. Pevar. Mr. McNeese, you

* * *

United States District Court
District of Idaho
Boise, Idaho

NOEL GOMEZ, et al, Plaintiffs, vs. RICHARD VERNON, et al, Defendants.	)	Docket No. CV-91-0299-S-LMB Boise, Idaho February 20, 1998 8:00 a.m.

COURT TRIAL - DAY 10

THE HONORABLE LARRY M. BOYLE PRESIDING
UNITED STATES MAGISTRATE JUDGE

* * *

KLAUSER - RECROSS

[47] Q What are your -

A - when you say special moves, that we're talking about a major move of a group of inmates from the Idaho Department of Corrections to Minnesota?

Q Correct.

A There's a variety of different reasons as to why they might be different on one move to the next. In the case of Minnesota, every one of those individuals who was sent there was a volunteer, and the information was

provided up front. They had good medical facilities at – in Minnesota. And so, those were not as prevalent as when we sent inmates, who are – who for the vast majority of whom were not volunteers, and were being sent to Louisiana, where the medical car [sic] available was not – not as great, that the opportunities may not have been the same. So, there's criteria established as appropriate by the department for each and every move as to who would be considered –

Q Was the criteria –

A – for –

Q – to be cleared for legal on the Minnesota move, which was a voluntary move, to your knowledge, any different than the criteria for legal clearance for the other out-of-state moves?

A No.

Q Okay. Do you know if the Texas or the Louisiana moves [48] were voluntary or involuntary moves?

A My recollection is the vast majority of inmates who went to Minnesota were volunteers. That some of those who went to Texas, and a percentage – and I don't know what that percentage really is, maybe it was twenty to forty or sixty percent, I don't have any idea – were volunteers. But the vast majority of those people who went to Louisiana were not volunteers.

Q Now, do you have any knowledge whether the department's legal staff, i.e., the deputies attorney general, consulted with the CLLS officers at the law libraries when considering whether to approve an out-of-state move of an inmate whose name appeared on the list?

A I have no knowledge of that.

Q To the best of your knowledge, did the *Olds versus Green* lawsuit have anything to do with Mr. Olds' transfer?

A No.

Q Isn't it true that you received a report from the attorney general's office on significant legal activity on a bi-monthly basis?

A I receive – I do receive a document from the attorney general's office, and it generally lists two, three or four significant lawsuits that are taking place within the department.

Q And does Mr. Zmuda refer to that document when

* * *

United States District Court
District of Idaho
Boise, Idaho

NOEL GOMEZ, et al,	)	
	)	Docket No.
Plaintiffs,	)	CV-91-0299-
	)	S-LMB
vs.	)	
	)	
RICHARD VERNON, et al,	)	
	)	Boise, Idaho
Defendants.	)	March 16, 1998
	)	8:00 a.m.

COURT TRIAL – DAY 15

THE HONORABLE LARRY M. BOYLE PRESIDING
UNITED STATES MAGISTRATE JUDGE

* * *

OGDEN – DIRECT

[14] DIRECT EXAMINATION

BY MS. ALTIG:

Q Good morning, Ms. Ogden. You were deposed by the plaintiffs before we rested – or recessed a couple of weeks ago about the criteria that were applied for inmates selected to be moved to Louisiana. Would you please briefly explain to the Court because Mr. Pat Hall who is one of the plaintiffs in this case was selected as part of that group to go to Louisiana, and I will represent to you that he claims that his move – or that he was selected because of his involvement in this case and perhaps for reasons also involving his position as a law clerk at the IMSI law library.

So could you please explain the criteria that were applied to select inmates to be transferred temporarily to Louisiana.

A The inmates needed to be the medium or a minimum classification. They were to be outside 24 months to a parole hearing or full-term expiration date. There were to be no outstanding medical or mental problems.

Q That –

A There were –

Q Pardon me. Go ahead.

A There were to be no forthcoming – let me rephrase that. There were to not – there was not to be any court hearing scheduled in the near future which would require their [15] appearance.

Q And why was that?

A It was a dollar-and-cents issue as far as it didn't make much sense to send someone as far as Louisiana if – if we knew that we were going to have turn around and bring them back within the next month or two.

Q When this criteria was applied to medium and minimum custody inmates, how many were selected as possible candidates to go to Louisiana?

A I'm not sure I understand your – your question.

Q Well, let me ask it this way: Strictly speaking, minimum and medium custody level, 24 months to release on parole or full-term expiration, do you recall how many inmates met that criteria, that initial criteria?

A No.

Q Okay. And why is that?

A My job was to find 300 inmates or to take from a scrubbed list 300 inmates that would be sent to Louisiana. I did not look at that base population. That was somebody else's responsibility.

Q Okay. Were you able to find 300 inmates that met this criteria that you just described?

A Barely.

Q Would you describe what you mean by barely?

A When I – when you asked me what the original criteria [16] was, and I said that it was – they had to be outside the 24 months before their next parole hearing or full-term expiration date, that number went down to 18 months, and then it went down to 12 months because we were not finding a large enough pool of inmates to – to select the numbers from to allow for – for alternates in the case people came off the list. Our target was 350 inmates so that we would have 300 that would be able to go.

We ran out of alternates at this facility. We – I believe that the day of the second transport, the final transport of 150 inmates, that we had less than five alternates. People were coming off the list all the time. It was – it was really – I was real concerned. We had people actually screening people in the county jails, people who had been sentenced had not yet been processed into the department hoping that we could find a pool of inmates out there that if we could not come up with 300 incarcerated here south of town, that – that we would pool from the county jails.

Q Ultimately, did you have to pull from the county jails?

A No, we did not.

Q And which institutions were inmates transferred from here in – or here in Idaho to Louisiana?

A The first hundred and – hundred and fifty inmates, the inmates are transferred from the Orofino facility, ICIO, and the maximum security facility, IMSI. The – the second move

* * *

OGDEN – CROSS

[18] Q Well, Ms. Ogden, did you even know about the Gomez case at this time?

A Well, that's what I was just trying to – to think of. I – I'm not sure I even knew of what the Gomez case – I'm not sure I heard the term "Gomez case." If I had, I would not have known what it referred to.

MS. ALTIG: I have no further questions.

THE COURT: Mr. Pevar? No. Ms. Winter?

MS. WINTER: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. WINTER:

Q Good morning, Ms. Ogden.

A Good morning.

Q You – it was in mid-May 1997 that you started working on this project to come up with a list of prisoners to move to Louisiana; isn't that right?

A That is correct.

Q And the project was to come up with this list beginning in mid-May and to complete the project by mid-July 1997; is that right?

A The date that I was given originally is that they would have liked to have had the process completed by the first of July.

Q And the goal was to move – I believe you testified the goal was to move 300 prisoners to Louisiana, although you [19] wanted to come with a list of 350 so as to have a cushion of alternates; is that correct?

A That is correct.

Q And the plan was to break that 300 into two moves of 150 each, one in June and the other in July; is that right?

A The move – the plan was to – to break – the initial plan was to break the – the move into two groups. Initially, we did not know exactly that those would be 150. We had to find out how many inmates the airplanes would safely handle.

Q All right. But you knew from the beginning it was going to be two moves?

A Yes.

Q And you actually did end up moving them in two groups of about 150 each; isn't that right?

A Yes.

Q One group went in – at the end of June, and the other went in mid-July?

A Yes.

Q And the June move was something like June 26th or thereabouts –

A Yeah.

Q – and the July move was July 10th or thereabouts?

A That is correct.

Q Now, the pool of prisoners you were drawing from was the entire population of prisoners in IDOC, of male prisoners who

* * *

[25] Q Now, in mid-May 1997, a memo went out from the administration, didn't it, the IDOC administration, to the wardens at the facilities we've been talking about, a memo telling the wardens that this move was going to take place and giving them a target number of medium and minimum custody prisoners that they should locate in their prison for the move?

A Yes.

Q The administration also asked the warden that certain additional screening criteria be applied by the facilities, didn't they? That is, at least the prisoner had to be at least a certain number of months away from a parole hearing date or end of sentence?

A Yes.

Q And another criteria that the administration asked the wardens to – to check out was that the prisoner had no serious medical or mental problems, you've testified?

A Yes.

Q And another criteria that the wardens were asked to look at – or to have their people look at was there were no immediately pending required court appearances; right?

A Yes.

Q Now, the facilities were told to turn those lists of all prisoners who met those criteria – to turn those lists in to you by June 9th, 1997; isn't that correct?

[26] A Yes.

Q In addition to the general factors that we've just now discussed that you've identified medium or minimum custody, certain number of months away from parole date or end of sentence, no serious medical or mental problems, no immediately pending court required appearance or detainers that would require the prisoners presence in – in Idaho, were there any other instructions from the administration to the facility as to what factors the facilities could consider or must consider or could not consider?

A I believe in that initial letter you summarized it very well.

Q So there was nothing else?

A In that initial letter, no, I do not believe so.

Q Now, you've testified that the one criteria did change, and that is the bar of 24 months from parole date or end of sentence was lowered. It was lowered to 18 months, and then it was lowered to 12 months; is that correct?

A Yes.

Q Now, apart from that lowering of that particular criteria to a 12-month standard, were there any other additional factors that the administration later told the facilities, "Here are further instructions on what you must consider, may consider or may not consider"?

A I believe that the institutions were – were asked to [27] look at the population – I hesitate to say this because I don't want to say it incorrectly – something about disciplinary points.

Q Was it that they should look at disciplinary points, they shouldn't look at disciplinary points, they could look at disciplinary points?

A I think that it was – it was in relationship to classification, and – and I can't answer your question. I'm not sure how the verbiage in – in that was written.

Q Was this in writing?

A I believe so.

Q So there was some other written criteria, but you're not sure whether it was something that the facility heads should or should not or must consider; is that correct?

A The way you stated it as written criteria makes it sound greater than it truly – than I believe it truly was. We were having a very difficult time coming up with the pool of inmates that met the criteria. I think that this was probably written more in terms of a brain – I mean, as let's take a look at and see how this affects the numbers.

Q There were – you're aware, aren't you, that there were a number of departments or individuals in departments that were supposed to screen the list of eligible inmates before sending you the move list, and I believe that you – you testified on direct examination that the list you got was the list of

* * *

[35] whatever, it doesn't mean that it's not within the scope of your examination, so I'll allow the question. Overruled.

MS. ALTIG: Thank you.

THE WITNESS: Yes.

BY MS. WINTER:

Q And what was Central Records supposed to – it went to Central Records for filtering or screening, and that was before it came back to you; isn't that right?

A I am Central Records.

Q You are Central Records, and so –

A I mean I'm the bureau chief in charge of Central Records.

Q I see. And did you actually do the screening for Central Records?

A No. I had one of the staff do it.

Q Was that before the list came back to you, the final move list?

A -I got multiple lists. I'm trying to find – decide just where in that sequence it happened. I would say yes.

Q What were your – and it was people under your supervision who were doing the – the screening in Central Records?

A Yes.

Q What were they supposed to look for?

A Detainers.

Q Anything else?

* * *

[45] A It really was not terribly difficult when you were given the numbers that I had available, and I had to bring 150. I said we ran out of alternates here.

Q When you say you ran out of alternates here, you mean at IMSI; right?

A Yes.

Q Now, did you also run out of alternates at ISCI?

A I believe that the day of the move I finally had one person left.

Q Where?

A At ISCI.

Q Now, I – we're at a little disadvantage here because you haven't had the – the requisite time to examine and sign your deposition, but I believe you testified that there were – that it was at IMSI that you ran out of alternates, but not at the other facilities; is that – did I misunderstand?

A No. In the deposition we did say that the – the facility that I ran alternates on was – was here. As long as I had at least one alternate at ISCI, I did not run out of alternates there.

Q Now, I believe you testified that you were down to five alternates at –

A I – Excuse me.

Q – at IMSI; is that incorrect?

A At IMSI?

* * *

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

No. 01-606

In The

Supreme Court of the United States

RICHARD A. VERNON, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION; DAVID PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, WARDEN, ISCI,

Petitioners,

v.

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARGARET WINTER
Counsel of Record
ERIC BALABAN
ELIZABETH ALEXANDER
THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION, INC.
733 15th Street, N.W., Suite 620
Washington, D.C. 20005
(202) 393-4930

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Stephen L. Pevar
American Civil Liberties Union
32 Grand Street
Hartford, CT 06106
(860) 293-1559

Howard Belodoff
2402 W. Jefferson Street
Boise, ID 83702
(208) 331-3378

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Counsel for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

STATEMENT OF THE CASE

Prisoners in the custody of the Idaho Department of Correction ("the Department") brought a class action lawsuit for injunctive and declaratory relief, alleging that prison officials retaliated against inmates who challenged the conditions of their confinement through the prison grievance system or the courts. After a nineteen-day bench trial, followed by a lengthy series of evidentiary rulings, hearings and motions, the District Court issued extensive findings of fact and conclusions of law. The District Court's 36-page order, "a model of clarity and detail," App. 13, concluded that the Department's employees repeatedly retaliated against inmates who exercised their right to petition for redress of grievances. It further concluded that policy-making prison officials knew that the inmates were complaining of retaliation, yet never investigated or disciplined any staff member for the retaliatory actions; instead, they condoned the retaliatory actions as a matter of custom and policy. App. 14-15. Based on these findings and conclusions, the District Court entered a declaratory judgment, denied class-wide injunctive relief, and granted narrowly-drawn individual injunctive relief to six inmates. App. 16. The District Court also entered a sanctions order against the

Departments' lawyers for secretly acquiring, photocopying and reading the inmates' confidential attorney-client mail in this litigation over a period of several months, with the assistance of prison law library and correctional staff, in violation of the attorney-client privilege and governing ethical rules. App. 22-23. The Court of Appeals affirmed, finding that the record amply supported the District Court's findings and orders. App. 3.

Petitioners now challenge the Court of Appeals' decision with respect to Plaintiff Bob Jones, one of the six inmates granted injunctive relief. They assert that Jones lacks standing because he suffered only "a subjective, hypothetical chill supported by no evidence that he suffered any adversity or that he curtailed his First Amendment activity." Pet. at 11-12. This argument hinges on a misstatement of the record. The courts below found that Jones did suffer injury and did curtail his First Amendment activity as a result of Petitioners' retaliatory actions. Petitioners are, in effect, asking this Court to reject the District Court's factual findings that (1) Jones' complaints were a legitimate effort to orally grieve his concerns that Department employee Michelle Nelson was impeding inmate access to the courts; (2) Nelson repeatedly sought to have Jones transferred to other prisons; (3) Nelson's efforts were motivated by a desire to punish Jones for his complaints about her professional misconduct; (4) Nelson's alleged legitimate reasons for transferring Jones were pretextual; (5) Nelson's efforts to punish Jones for his complaints were without any discernable penological purpose; (6) Nelson's efforts to transfer Jones were narrowly averted; (7) Nelson's efforts to punish Jones chilled his exercise of his right to complain of Nelson's conduct;

(8) Nelson's retaliatory actions finally caused Jones to resign his prison job; and (9) there was a real threat of future retaliatory transfers. There was ample record support for the lower courts' resolution of these issues, as shown below, and this Court should not revisit them. Petitioners' arguments that Mr. Jones had no standing to bring a retaliation claim because he did not meet the "atypical and significant hardship" requirement of *Sandin v. Conner*, 515 U.S. 472 (1995), or the "actual injury" requirement of *Lewis v. Casey*, 518 U.S. 343 (1996), are simply without merit. Point I, *infra*.

Petitioners also contend that in affirming the District Court's findings and conclusions with respect to Mr. Jones, the Court of Appeals erred because (1) Jones' complaints were not protected speech and therefore punishment for that speech did not constitute retaliation; and (2) even if Jones' speech was protected, the lower court failed to apply *Turner v. Safley*, 482 U.S. 78 (1987), to determine whether prison officials had legitimate penological reasons for limiting that speech. Petitioners raised neither of these arguments in the Court below, and this Court accordingly should not entertain them. Even if they could be raised for the first time in a petition for certiorari, there is no merit to either argument. *See* Points II and III, *infra*.

The record is summarized below.

Mr. Jones became a law clerk at Idaho Maximum Security Institution (IMSI) in 1991. He then became the lead law clerk. [8 Jones 202:25-203:7][1]

The Warden had a high regard for him. [13 Barker 187:21-23, 189:6-13] In 1995, the Associate Warden asked Mr. Jones to develop training materials for other law clerks. [8 Jones 204:1-15, 205:4-7]

In late fall of 1995, the Department hired Michelle Nelson to fill a newly created position, that of Correctional Law Library Specialist at IMSI. Mr. Jones soon began raising concerns with Ms. Nelson about her supervision of the law library. He repeatedly complained to her of her failure to follow Department policy, her frequent absences, and her failure to appear at scheduled appointments with inmates. [8 Jones 207:1-208:10] Ms. Nelson acknowledged that Mr. Jones always made these complaints in a diplomatic manner, and that she never knew him to be anything but a gentleman. App. 55. However, Nelson admitted, she wanted to fire Jones "right off the bat." [7 Nelson 99:17-20] In early 1996, Ms. Nelson did fire Mr. Jones. [8 Jones 234:13-18]

Ms. Nelson claimed that she fired Mr. Jones because a confidential informant had told her that Jones was stealing books from the law library. [7 Nelson 25:5-12] Nelson later admitted, however, that she was aware Jones had only moved the books to his new work station in the room adjoining the law library. [7 Nelson 26:17-27:13]

---

[1] Bracketed citations refer to the trial transcripts: day, witness, page: line.

In March 1996, days after Ms. Nelson fired Mr. Jones, Mr. Jones was suddenly transferred from IMSI to another facility, Idaho State Correctional Institution (ISCI). [9 Jones 30:1-18] Ms. Nelson acknowledged that she sometimes worked things out with the move coordinator regarding transfers of inmates, and that in this case she "made sure" that the move coordinator knew that Jones no longer worked in the law library and was therefore eligible to be transferred. [7 Nelson 81:22-82:4; 93:3-8; 94:15-20; 95:24-96:2]

According to Department security and library staff, the normal practice is for inmates who are transferred to take their legal materials with them, or else to receive them shortly after the move. [5 Race 40:14-25; 3 Shedd 172:24-173:12] Ms. Nelson, however, had Mr. Jones' legal files locked away, and ordered that he not be allowed access to them. [8 White 5:13-22; 9 Jones 27:4-19, 31:19-32:1] Ms. Nelson retained Mr. Jones' legal materials for several months. [9 Jones 40:18-24] In barring his access to his criminal files and transcripts, she impaired his ability to assist in his own defense in his pending appeal. [9 Jones 106:4-8]

In February 1997, a year after his transfer, Mr. Jones became a law clerk at ISCI. [9 Jones 32:2-7] In March or April 1997, Michelle Nelson became the law library supervisor at ISCI. [9 Jones 32:2-7, 19-24] The same things that had happened in 1995-96 at IMSI began to happen at ISCI. Ms. Nelson was absent from work, did not show up for scheduled appointments with inmates, and violated Department policies. [9 Jones 33:8-21] Mr. Jones raised his concerns about these matters with Ms. Nelson [9 Jones 33:1-21], and this angered her. [9 Jones 84:15-17] Ms.

Nelson met with the Deputy Warden Gary Barrier and asked him to transfer Mr. Jones to another Department facility in Orofino, Idaho. [6 Nelson 19:2-10, 179:23-181:7, 198:1-8]

Ms. Nelson told Officer Race, a correctional officer assigned to the ISCI law library, that she knew someone in the transfer department and that she could have Jones transferred. App. 55. She told Officer Race that this would be marked down as "coincidence." [9 Jones 34:14-35:3] Officer Race responded that having Jones transferred would be improper because Jones had a state habeas corpus action pending. App. 56. Furthermore, Officer Race thought it would be imprudent to transfer Jones because he was the most experienced law clerk and was an asset to the law library. App. 56. Nelson, however, was unwilling to relent in her pursuit of effectuating the transfer. App. 56. Officer Race interceded on Jones' behalf with the Deputy Warden to prevent the transfer, and ultimately the transfer to Orofino did not take place. *Id.*

At trial, Ms. Nelson initially denied that she had wanted Mr. Jones transferred to Orofino. After reviewing her deposition testimony, however, she admitted that she did want him transferred. At first, she claimed that she wanted him transferred because the Deputy Attorney General had asked Jones to persuade another inmate to accept a settlement offer from the Department, and Nelson felt that she was unwillingly being put "in the middle" of these negotiations. [6 Nelson 182:9-16; 191:2-10; 198:13-21] It transpired, however, that her only involvement had been in placing a telephone call to Jones from the Deputy Attorney General. Ms. Nelson later claimed that she wanted the transfer because she felt

"threatened" by Mr. Jones after she fired him at IMSI. [7 Nelson 96:19-97:10] This justification was also unconvincing since she conceded that she had never known him to behave other than as a gentleman and that he had never threatened her in any way. App. 55.

After Ms. Nelson learned that Jones would not be transferred to Orofino, she became angry and disappointed. App. 56. She became visibly agitated and upset, slamming drawers, cursing, and using a lot of four-letter words. [5 Race 52:21-53:14] Shortly thereafter, she renewed her efforts to have Mr. Jones transferred. App. 56. [5 Race 45:6-7, 51:23-52:4.]

In July 1997, Petitioners selected a number of inmates in their custody for transfer to a prison in Louisiana. They notified the affected inmates by letter and told them to get ready for the move. Mr. Jones was not on the list and did not receive the notification letter. Nevertheless, the morning of the move, the day-shift corporal told Jones that he had just gotten a call from "up front" and that Jones should pack up his things immediately because he was going to Louisiana within the hour. [9 Jones 35:4-36:3; 84:20-22] Mr. Jones told the Deputy Warden that he would challenge the transfer in court. [9 Jones 36:6-13] About an hour later, after Mr. Jones' property had been loaded on the bus, the Deputy Warden told Jones that he would not be transferred to Louisiana after all. [9 Jones 37:6-12] Mr. Jones later learned that another inmate had contacted Plaintiffs' class counsel, who had intervened with the Deputy Attorney General to halt Jones' transfer. [9 Jones 38:15-24]

After the episode in July 1997, Mr. Jones resigned from his job in the law library. He decided that he was doing himself harm by staying under Nelson's supervision, and he tendered his resignation in August 1997. [9 Jones 38:25-39:7]

Mr. Jones was known throughout the institution, from the warden to correctional staff, as a trustworthy and truthful person. [13 Barker 188:9-189:5; 7 White 207:12-21; 5 Race 59:12-14] Officer Race testified that he had never known Mr. Jones to lie, but that he had known Ms. Nelson to lie, and that Ms. Nelson was capable of retaliating against an inmate by having him transferred or fired. [5 Race 31:21-32:27; 55:7-10; 57:1-4; 59:1-16; 73:10-15]

REASONS WHY THE PETITION SHOULD BE DENIED

I. CONTRARY TO PETITIONERS' CLAIM, THE APPELLATE COURT DID NOT HOLD THAT A PRISONERS' CLAIM MAY BE BASED ON A "WHOLLY SUBJECTIVE CHILL," AND THIS CASE DOES NOT PRESENT A CIRCUIT SPLIT

A. Petitioners' Argument Depends Upon Misstatement of the Record

Petitioners argue that Mr. Jones does not have standing because he neither sustained nor was in immediate danger of sustaining an injury as a result of official conduct. Pet. at 8-10 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). Petitioners claim that the Court of Appeals

affirmed injunctive relief "based on a subjective, hypothetical chill supported by no evidence that [Jones] suffered any adversity or that he curtailed his First Amendment activity" and that "[h]e resigned his job only because he didn't like being supervised by Nelson and he planned to sue her." Pet. at 11-12. This characterization of the record is inaccurate. As summarized above, the July 1997 incident – in which Nelson's effort to have Jones transferred to Louisiana was averted at the eleventh hour through outside intervention – was the culmination of a two-year-long campaign by Nelson, in which she fired him from his job, attempted at least three times to transfer him, falsely accused him of theft and fraud, and interfered over a period of months with his ability to prosecute an appeal of his criminal case. Mr. Jones testified, and the District Court found, that Mr. Jones resigned his job after the episode in July 1997 because he believed that he was doing himself harm by staying under Nelson's supervision. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (noting that the National Labor Relations Board "has long held that an employer violates [the National Labor Relations Act] . . . when it purposefully creates working conditions so intolerable that the employee has no option but to resign – a so-called 'constructive discharge' ").[2]

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[2] Every circuit recognizes constructive discharge as a form of adverse employment action. *See, e.g., Grube v. Lau Indust., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001); *Wardwell v. Sch. Bd. of Palm Beach County, Fla.*, 786 F.2d 1554, 1557 (11th Cir. 1986) (recognizing pre-5th Circuit split authority); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (listing cases); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3d Cir. 1984) (listing

Although Petitioners continue to insist that Jones "resigned his job only because he didn't like being supervised by Nelson and he planned to sue her," Pet. at 12, the conclusion of the courts below, that Mr. Jones resigned his job under pressure of Ms. Nelson's relentless efforts to retaliate against him for expressing his concerns about her conduct, App. 15, 55-56, is amply supported by the record.

B. The Court of Appeals' Decision Is Not Inconsistent With Any Decision of This Court

Petitioners argue that the District Court's decision is inconsistent with *Sandin v. Conner*, 515 U.S. 472 (1995), because the injury Mr. Jones suffered was not "atypical and significant in the context of ordinary prison life." Pet. at 10. Jones' claim, however, did not involve a due process challenge to a prison disciplinary proceeding and therefore *Sandin* is inapplicable. *Sandin*, moreover, explicitly notes that prisoners "retain other protection from arbitrary state action even within the expected conditions of confinement," 515 U.S. at 487 n.11, and may invoke the First and Fourteenth Amendments where appropriate

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constructive discharge cases in the 1st, 2nd, 5th, 6th, 8th, 9th, 10th, and D.C. circuits); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (noting, "The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.").

without showing that they suffered an "atypical and significant injury." *Id.*

Likewise, Petitioners erroneously contend that the District Court's decision is inconsistent with *Lewis v. Casey*, 518 U.S. 343 (1996), because Jones did not show "that he personally suffered an actual injury in the form of loss or interference with a non-frivolous claim involving his conviction, sentence or conditions of confinement." Pet. at 10-11.[3]

The requirement that injury suffered be "in the form of loss or interference with a non-frivolous claim involving his conviction, sentence or conditions of confinement" applies to claims that prison officials have failed to fulfill their affirmative obligation of providing meaningful access to the courts, not to claims that prison officials violated their negative obligation to refrain from retaliating against inmates for exercising their right of access. *See Crawford-El v. Britton*, 523 U.S. 574 (1998) (recognizing that a prisoner alleging that prison officials deliberately misdirected boxes containing his personal property, in retaliation for his exercise of his First Amendment rights, stated a claim, although the alleged injury did not take the form of loss or interference with a legal claim).

C. The Court of Appeals' Decision Does Not Conflict With the Law in Other Circuits

Petitioners contend that the Ninth Circuit erred in failing to apply "an objective test" to determine whether

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[3] Petitioners did not raise this argument in the Court of Appeals.

a prisoner alleging retaliation has suffered constitutional injury, namely, whether a person of "ordinary firmness" would be deterred by the retaliation from exercising his or her constitutional rights. Pet. at 12-14. According to Petitioners, the Ninth Circuit's decision "illuminates" a conflict between those Circuits which do and those which do not apply the objective test. This case does not present the alleged conflict. The Ninth Circuit currently applies the "ordinary firmness" standard in determining whether a chilling effect rises to the level of a constitutional injury. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("This court has held that government officials violate this provision when their acts 'would chill or silence a person of *ordinary firmness* from future First Amendment activities.' ") (quoting *Mendocino Envt'l Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (citation omitted)) (emphasis added). Nothing in the decision below suggests that the Court of Appeals did not follow circuit precedent in determining that a person of ordinary firmness would be chilled by Nelson's retaliatory behavior. While the Court of Appeals did not recite verbatim the words "person of ordinary firmness," it stressed that the chilling effect of Nelson's conduct manifested itself in Jones' decision to resign his library job, and made clear that Jones' decision to resign was objectively rational under the circumstances. *See* App. 15 ("The reality is that in the face of repeated threats of transfer because of his complaints about the administration of the library, Jones eventually quit his law library job. . . . It is the chilling effect that *forced* Jones to quit his job" (emphasis added)).

II. PETITIONERS' ARGUMENT THAT JONES' COMPLAINTS WERE NOT ENTITLED TO FIRST AMENDMENT PROTECTION WAS NOT RAISED BELOW AND IN ANY EVENT IS WITHOUT MERIT

Petitioners argue here for the first time that Mr. Jones suffered no retaliation because his complaints about Ms. Nelson's conduct were not entitled to First Amendment protection. Pet. at 20. Since Petitioners never raised this argument in the courts below and the Court of Appeals did not pass upon it, this Court should decline to hear it. *See United States v. United Food, Inc.*, ___ U.S. ___, ___, 121 S. Ct. 2334, 2341 (2001).

Even if that argument had been raised below, and were properly before this Court, it is without merit. Prisoners have First Amendment rights, *see Turner v. Safley*, 482 U.S. 78, 84, 91 (1987), and those rights unquestionably include the right to criticize prison staff for alleged misconduct. *See Crawford-El v. Britton*, 523 U.S. 574 (1998). Retaliation against prisoners for exercising their First Amendment rights, like retaliation against persons in the free world, offends the Constitution because "it threatens to inhibit exercise of the protected right." *Id.* at 588 n.10.

Petitioners also posit that because, under *Lewis v. Casey*, "there is no right to a law library to begin with," inmates have no First Amendment right to criticize prison officials for their operation of an existing law library, and Ms. Nelson was free to retaliate against Mr. Jones for bringing grievances relating to the operation of the library. Pet. at 24. It is irrelevant that prisoners have no "right to a law library." They have a First Amendment

right to complain to prison authorities, in a manner that violates no prison rules, when they believe that their access to the courts is being improperly curtailed.

Petitioners' reliance on *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475 (2001), is similarly mistaken. Contrary to Petitioners' argument, *Shaw* does not stand for the proposition that prisoners' complaints are outside the ambit of First Amendment protection simply because they happen to concern the operation of a prison law library. Pet. at 21-24. Mr. Jones, unlike the plaintiff in *Shaw*, claimed no "special right" to provide legal assistance to others, *Shaw*, 121 S. Ct. at 1478. Also in contrast to the claim presented in *Shaw*, Mr. Jones' criticisms of Ms. Nelson's unprofessional conduct violated no prison rule. Petitioners have never even suggested to the contrary; nor have they ever before claimed that Mr. Jones' criticisms of Ms. Nelson were for any reason outside the bounds of protected speech.

III. PETITIONERS' CONTENTION THAT THE DISTRICT COURT ERRED IN NOT APPLYING *TURNER V. SAFLEY* WAS NOT RAISED BELOW AND IN ANY EVENT IS WITHOUT MERIT

Petitioners also argue here, for the first time, that the District Court erred in failing to evaluate Ms. Nelson's treatment of Mr. Jones under the standard set forth in *Turner v. Safley*. Pet. at 25. But even if the argument were properly before this Court, it would have no merit. The District Court did in fact apply *Turner* in finding that Petitioners retaliated against Mr. Jones, App. 40-41, and specifically found that the justifications Nelson offered

for her retaliatory actions were pretextual, and that those actions were "not substantially justified by any discernible penological purpose." App. 58. The Court of Appeals affirmed. App. 15.

Petitioners also attempt to conjure a Circuit split on this issue by showing that the Courts of Appeal "are not unanimous in their views of which types of activity are constitutionally protected," Pet. at 22-23, since some "have held that a provision of legal assistance to other prisoners is not a protected right for retaliation purposes," while others have held that there is "no constitutional right to participate in a prison grievance procedure," and others, "that there is no right to an unlimited use of a prison law library." Pet. at 23. No Circuit, however, holds that prisoners are without a constitutional right to do what Mr. Jones did in this case: orally raise concerns and complaints with his correctional supervisor about her arbitrary conduct, without violating any prison rule or regulation.

CONCLUSION

For the reasons discussed herein, the Petition should be denied.

Respectfully submitted,

MARGARET WINTER
Counsel of Record
ERIC BALABAN
ELIZABETH ALEXANDER
THE NATIONAL PRISON PROJECT OF THE
ACLU FOUNDATION, INC.
733 15th Street, N.W., Suite 620
Washington, D.C. 20005
(202) 393-4930

STEPHEN L. PEVAR
AMERICAN CIVIL LIBERTIES UNION
32 Grand Street
Hartford, CT 06106
(860) 293-1559

HOWARD BELODOFF
2402 W. Jefferson Street
Boise, ID 83702
(208) 331-3378

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

Counsel for Respondents

(3)

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In The

Supreme Court of the United States

RICHARD A. VERNON, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION; DAVE PASKETT, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION; JAMES C. SPALDING, DIRECTOR, IDOC; JOE KLAUSER, WARDEN, ISCI,

Petitioners,

v.

NOEL PUENTE GOMEZ; LEE MAZUR HAYS; BOB JONES; ALFREDO ROMAN; PATRICK HALL; MARQ BARTLETT; GREGORY JOSEPH NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

ALAN G. LANCE
Attorney General

MICHAEL A. HENDERSON
Deputy Attorney General
Division Chief, Criminal Division

PAUL R. PANTHER*
Deputy Attorney General
1299 North Orchard St., Suite 110
Boise, Idaho 83706-2266
(208) 658-2097

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Respondents' brief in opposition to the Petition for Writ of Certiorari underscores why the Court should undertake review of the issues raised in that Petition. The Response includes a number of factual assertions which are not supported by the record. The Court is now presented with three factual scenarios: (1) The actual record, in which the Magistrate concluded that the only retaliation against Bob Jones was two attempted, but failed, transfers; (2) the Appellate Court's version, which includes a finding not made by the Magistrate that Jones quit his job because of a chilling effect; and (3) Respondents' version which now includes a two year "campaign" of retaliation against Jones that, according to the Magistrate, never happened. Adoption of the objective "person of ordinary firmness" test urged by Petitioners, or, for that matter, the "atypical and significant hardship" test urged by the Amici, would make the task of sifting through such conflicting interpretations of the facts unnecessary.

Instead, a court dealing with a retaliation claim would begin its inquiry by examining what type of injury the prisoner claims to have suffered. Where, as here, the alleged injury was not one that would deter a "person of ordinary firmness" from pursuing his constitutional rights, or, as urged by Amici, one that constituted an "atypical and significant hardship" in the prison context, the inquiry would end and the case would be dismissed. The unnecessary entanglement of federal courts in the affairs of state prisons which has been the subject of repeated cautions by this Court, would be avoided. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is for the courts to provide relief for claimants . . . it is the role of

the political branches of the State and Federal Governments to manage prisons"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (recognizing that "day-to-day prison operations are consigned to the executive, not the judiciary"); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976) (cautioning against involving the judiciary "in issues and discretionary decisions that are not the business of federal judges").

Respondents urge the Court to ignore the intervening change in law presented by *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475 (2001). The Court should not do so. Jones' speech was not entitled to special protection based solely on its content so as to avoid the application of the "unitary deferential standard for reviewing prisoners' constitutional claims" which was set forth in *Turner v. Safley*, 482 U.S. 78 (1987), as required in *Shaw*, 121 S.Ct. at 1479.

Petitioners will now address the new points raised by Respondents in the order in which they were presented.

I. RESPONDENTS' ARGUMENT THAT BOB JONES WAS THE VICTIM OF A CAMPAIGN OF RETALIATION MISSTATES THE RECORD.

Respondents argue that Jones suffered injury because he was the victim of a "relentless" two year campaign of retaliation by Michelle Nelson, during which she fired him from a job, attempted at least three times to transfer him, falsely accused him of theft and fraud, and interfered with his criminal appeal. Response at 9-10. This argument, which attempts to bolster Jones' injury claim with allegations that were never proven at trial, is itself a recognition of the *de minimis* nature of that claim.

A reply to this argument must take into account the manner in which the Magistrate dealt with claims of retaliation which Respondents alleged but failed to prove. The Magistrate stated at the beginning of his Findings of Fact:

> . . . to the extent the Court had concluded that the evidence in the record does not support certain instances of retaliation alleged by Plaintiffs to have occurred, they will not be included in the Court's Findings of Fact or otherwise referenced herein. In the event an incident or series of actions are not contained in these Findings of Fact, it is not an oversight or unintentional omission. Rather, the failure to mention an event or series of events in these Findings is an indication that the evidence does not support a finding of retaliation or other violation of Plaintiff's protected rights.

App. at 48. Simply stated, if the Magistrate's Findings of Fact don't mention it, it was not retaliation.

The Magistrate's Findings do not mention Respondents' claims that Nelson fired Jones from a job at IMSI in 1996, that she had him transferred from IMSI (a maximum security prison) to ISCI (a medium security prison) in March 1996, that she denied Jones access to his legal materials, and that she impaired his ability to assist in his defense in a pending appeal. Response at 4-5. These actions were not, then, retaliatory and they cannot be considered in determining whether Jones suffered an injury.

II. RESPONDENTS' CONTENTION THAT JONES RESIGNED FROM HIS JOB BECAUSE OF HARM AND INTOLERABLE CONDITIONS IS NOT SUPPORTED BY THE RECORD.

Respondents contend that Jones resigned from his law library job in July 1997 because "he believed that he was doing himself harm by staying under Nelson's supervision." Response, p. 9. Respondents suggest that his working conditions were "so intolerable" that he had "no option but to resign," citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

To the contrary, the Magistrate did not find that Jones was harmed, or that he believed he was being harmed, or that his working conditions were intolerable. The Magistrate found that Jones "determined that his work in the law library, especially being under CLLS Nelson's supervision, was detrimental so on August 1, 1997, he tendered his resignation," but that he nonetheless worked for Nelson until August 15, 1997. App. at 57. Jones initially explained that:

> . . . it just seemed to me that there wasn't any use in my staying there. And actually, I was doing myself harm, because I was underneath her supervision.

App. to Reply at 2. He later admitted that this "harm" was no more than his dislike of Nelson's supervision, and that he also had another reason for quitting:

> Q. And why did you leave?
>
> A. Because I just didn't want to be subject to her control any more.
>
> Q. Wasn't it because you had just gotten ready to file a lawsuit against Michelle Nelson?
>
> A. Well, that was part of it, yes.

App. at 93. Jones went on to state that he "didn't think it was fair to her to be in her employ" once he had filed that lawsuit. App. at 94. It is absolutely clear that Jones quit his job because he did not like having Nelson as a supervisor and he wanted to sue her. Those may be perfectly good reasons for quitting a job, but they are not injuries sufficient to establish standing under Article III of the United States Constitution.

III. *SANDIN v. CONNER* APPLIES TO JONES' CLAIM.

Respondents seek to avoid the application of *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995) to this case by suggesting that Petitioners are trying to fit a round peg in a square hole in applying *Sandin*'s due process analysis to this retaliation case. Response at 3, 10-11. This oversimplifies and misconstrues Petitioners' argument.

Petitioners argue that the lower courts' decisions were inconsistent with the entire scope of this Court's standing precedent, and more particularly, with precedent in prison cases such as *Sandin*, all of which required that a plaintiff have suffered an identifiable injury. In contrast, the lower courts granted and affirmed relief in the absence of identifiable injury. The lower courts' decisions are out of step with the entire scope of standing precedent, including *Sandin* and *Lewis*.

Sandin is relevant in two additional respects.

First, Ohio and other Amici now urge the Court to adopt *Sandin*'s "atypical and significant hardship" standard in the retaliation context, while Petitioners urge adoption of the "person of ordinary firmness" test, as set forth in *Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). While the respective arguments of Petitioners and Amici take different conceptual approaches, both urge the Court

to adopt an objective test that would eliminate claims based on wholly subjective and factually unsubstantiated injuries. Adoption of the "person of ordinary firmness" test advocated by Petitioners is thus entirely consistent with this Court's decision in *Sandin* in that both tests require an objective injury beyond a subjective chill.

Second, the Ninth Circuit itself has recognized that *Sandin* has application to retaliation cases. In *Pratt v. Rowland*, 65 F.3d 802 (1995), a retaliation case decided shortly after *Sandin*, the Ninth Circuit noted that while *Sandin* applied directly to due process cases, prisoners retained certain "other protections" from arbitrary state action, such as those guaranteed by the First and Fourteenth Amendments. 65 F.3d at 807, citing *Sandin*, 115 S.Ct. at 2302, n.11. *Pratt* held that Ninth Circuit retaliation law, in the form of cases such as *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985), fell within the category of the "other protections" mentioned in *Sandin*. *Pratt*, 65 F.3d at 806. However, *Pratt* went on to hold that future retaliation cases should be evaluated in light of the "general concerns expressed in *Sandin*," and in particular, *Sandin*'s admonishment to "afford appropriate deference and flexibility" to prison officials in evaluating proffered legitimate penological purposes for conduct alleged to be retaliatory. *Id.* at 807, citing *Sandin*, 115 S.Ct. at 2299.

The Ninth Circuit was correct in *Pratt*, but it did not go far enough. In addition to evaluating retaliation case with appropriate deference, this Court should set forth an objective standard of injury consistent with *Sandin*'s objective "atypical and significant hardship" test. Such a test is the "person of ordinary firmness" standard urged by Petitioners.

IV. THE APPELLATE COURT'S DECISION CONFLICTS WITH THE LAW OF OTHER CIRCUITS.

Respondents argue that the Appellate Court's decision does not conflict with the law of other federal circuits because the Appellate Court did apply an objective test to determine whether Jones had been injured, and that the "chilling effect" found by the Appellate Court constituted an objective injury. Response at 11-12.

The law of the various circuits is reviewed at length at pages 12-17 of the Petition. In that light, it cannot reasonably be maintained that the Appellate Court's decision does not directly conflict with settled law in the Second, Third, Sixth, and D.C. Circuits, and that it is not in apparent conflict with the law in the Fourth and Fifth Circuits.

Furthermore, the "chilling effect" asserted by Respondents, if it existed, was wholly subjective. Respondents tacitly admit this when they argue that Jones quit his job because "*he believed* that he was doing himself harm." Response at 9 (emphasis added). Respondents argue that Jones' subjective belief that he was harmed is a sufficient basis for relief, regardless of whether he suffered any harm observable by anyone else. Under this approach, because Jones is the sole judge of what he believed, he becomes in effect the finder of fact. For Respondents, Jones' subjective state of mind trumps any objective proof. There is no room for a "person of ordinary firmness" in this equation, or, for that matter, for any person except Jones.

V. PETITIONERS' ARGUMENT THAT JONES' COMPLAINTS WERE SUBJECT TO *SHAW v. MURPHY* ARE NOT BARRED BECAUSE THEY WERE NOT RAISED BELOW.

Respondents argue that Petitioners are barred from arguing that this Court's decision in *Shaw v. Murphy, supra,* applies to Jones' claims because Petitioners did not raise it below. Response at 13.

In support of their position, Respondents cite *United States v. United Food, Inc.,* ___ U.S. ___, 121 S.Ct. 2334 (2001). That case does not encourage the practice of raising new issues on appeal, but does not hold that a party can never raise such an issue. 121 S.Ct. at 2341. Contrary to Respondents' suggestion, this Court has considered issues on appeal which were not raised below when there was an intervening change in controlling case law. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Rosenblatt v. Baer,* 383 U.S. 75 (1966); *Hormel v. Helvering,* 312 U.S. 552 (1941).

The *Shaw* opinion was issued in April 2001, after this case had been submitted to the Appellate Court. *Shaw* held that the content of prison speech creates no special protection and that all prison speech is subject to the four-part *Turner v. Safley* analysis which is grounded on recognition of the unique difficulties inherent in prison management. *Turner,* 482 U.S. at 84; *Shaw,* 121 S.Ct. 1479. *Turner* and *Shaw* require appropriate deference to the prison authorities' assertion of a legitimate penological purpose. *Id. Shaw,* and thus *Turner,* should be applied to Jones' claim. Respondents' contention that *Shaw* should now simply be ignored should be rejected.

VI. JONES' ORAL COMPLAINTS ABOUT NELSON'S MANAGEMENT OF THE LAW LIBRARY WERE NOT ENTITLED TO SPECIAL PROTECTION BASED SOLELY ON THEIR CONTENT.

According to Respondents, Petitioners argue that *Shaw* stands for the proposition that prisoners' complaints about a prison law library are "outside the ambit of First Amendment protection." Response at 14. This is not the position held by Petitioners.

Petitioners do not argue that *Shaw* holds that prisoners' complaints are entitled to no protection. Petitioners do argue that, under *Shaw*, Jones' speech was not deserving of such a high level of protection as to avoid the *Turner* analysis. As this Court recognized in *Shaw*, no special protections are granted to prison speech based solely upon its content. *Shaw*, 121 S.Ct. at 1479-80. But, the Magistrate found just such a special protection when he held that "complaints regarding the operation of a prison law library are *unique* in the prison context for purposes of this instant action." App. at 57 (emphasis added). The Magistrate elevated Jones' complaints to a level deserving greater protection than other types of prison speech, including, apparently, speech about medical issues, conditions of confinement, use of force and other important issues. The Appellate Court compounded this error by accepting the Magistrate's analysis. App. at 15.

VII. THE APPELLATE COURT FAILED TO APPLY *TURNER v. SAFLEY*.

Respondents contend that the Magistrate did actually apply the *Turner v. Safley* analysis, because it was mentioned in his decision. Response at 14-15. Respondents' argument is based on the fact that the Magistrate quoted

Turner in a portion of his decision that was devoted to a general summary of the law of retaliation. App. at 40-41. There is a difference between applying a legal standard and merely mentioning it as a part of a survey of the underlying law. The conclusion that the Magistrate applied *Turner* to Jones' claim does not necessarily follow from the fact that he demonstrated his familiarity with it. A review of the Magistrate's decision reveals that he did not apply *Turner* to Jones' situation. In the face of considerable evidence that the cancelled transfer of Jones to Louisiana was grounded in legitimate penological purposes, the Magistrate did not defer but instead found the proffered reasons for the transfer pretextual and decided the attempted transfer was retaliatory. The Appellate Court affirmed, also failing to apply, or even mention, *Shaw* and *Turner*.

CONCLUSION

Based on the reasons set forth in the Petition and those set forth herein, Petitioners respectfully urge the Court to grant their Petition.

Respectfully submitted,

ALAN G. LANCE
Attorney General

MICHAEL A. HENDERSON
Deputy Attorney General
Division Chief, Criminal Division

PAUL R. PANTHER*
Deputy Attorney General
1299 North Orchard St., Suite 110
Boise, Idaho 83706-2266
(208) 658-2097

**Counsel of Record*

United States District Court
District of Idaho
Boise, Idaho

NOEL GOMEZ, et al, Plaintiffs, vs. RICHARD VERNON, et al, Defendants.	)	Docket No. CV-91-0299-S-LMB Boise, Idaho February 19, 1998 8:00 a.m.

COURT TRIAL - DAY 9

THE HONORABLE LARRY M. BOYLE PRESIDING
UNITED STATES MAGISTRATE JUDGE

COURT RECORDER:	TRANSCRIPTION BY:
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* * *

JONES - DIRECT

[38] with this. And I said, I know for a fact – well, by then I was so angry that I said to her, I know for a fact that you tried to transfer me to Orofino. And she said, yeah, I did, but I didn't have anything to do with this Louisiana move. I said, well, I'm not sure that I believe you. It

seems like every time I get around you, I get transferred or rolled up, or something happens.

And we left it at that, because I wasn't getting anywhere and I didn't really want to get in trouble over it.

Q Did there come a time when you –

A Oh, she showed – I'm sorry – she showed me the list, the move list, and said, look, you weren't even on the move list, how could I have anything to do with this, and she showed it to me.

Q Did you, thereafter, get any information about what had happened between the time you first spoke to Barrier and the time that he came back and told you that you weren't going to be transferred?

A One of the other law clerks, I believe it was Marq Bartlett, told me that he had called Steven, and Steven had called Mr. McNeese, and McNeese had, at Steven's insistence, had intervened.

Q Steven Pevar?

A Pevar.

Q Did there come a time when you stopped working as a law [39] clerk at ISCI?

A Well, after that episode – after that episode, that was in July, and within a couple of weeks it just seemed to me that there wasn't any use in my staying there. And actually, I was doing myself harm, because I was underneath her supervision. So, I turned in my resignation on the 1st of August and I left on the 15th.

Supreme Court, U.S.
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(4)

No. 01-606

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS BEAUCLAIR, DIRECTOR, IDAHO DEPARTMENT OF CORRECTION, *et al.*,

Petitioners,

v.

NOEL PUENTE GOMEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 17 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY
State Solicitor
ROBERT C. MAIER*
TODD R. MARTI
Assistant Solicitors
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

26 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

BILL LOCKYER
Attorney General
State of California

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A.
BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

STEPHEN CARTER
Attorney General
State of Indiana

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. LEYOUB
Attorney General
State of Louisiana

JENNIFER M.
GRANHOLM
Attorney General
State of Michigan

PHILIP T.
MCLAUGHLIN
Attorney General
State of New Hampshire

FRANKIE SUE DEL
PAPA
Attorney General
State of Nevada

W.A. DREW
EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK L. SHURTLEFF
Attorney General
State of Utah

QUESTIONS PRESENTED

The amici States support Idaho's question that concerns standing, rewriting the question as follows:

(1) Whether a state prison inmate can establish standing to assert a claim of First Amendment retaliation based solely on a subjective "chill."

In addition, the amici States ask the Court to grant certiorari on the following question:

(2) Whether a state prison inmate who claims that state officials have retaliated against him for statements that he has made must plead and prove an "adverse action" involving what the Court described in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), as a "restraint which imposes atypical and significant hardship in relation to the ordinary incidents of prison life."

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STATEMENT OF AMICUS INTEREST

Ohio and 17 other States support Idaho in urging the Court to review and reverse the Ninth Circuit's grant of relief on the amorphous prisoner retaliation claim at issue in this case – a type of claim that is becoming increasingly common.

Like Idaho, Ohio and the amici States all face the "inordinately difficult undertaking" of running their prisons, *Turner v. Safley*, 482 U.S. 78, 85 (1987), a "task that has been committed to the responsibility of [the legislative and executive] branches." *Id.* The States' concern arises from the acknowledged fact that administering prisons involves a "relationship of state prisoners [with] state officers who supervise their confinement [that is] far more intimate than that of a State and a private citizen," *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). This circumstance leads the States to make routine decisions that are necessary to maintain order, yet are highly likely to provoke complaints from prison inmates.

The connection of this case to that task lies in prisoners' increasing use of First Amendment retaliation theory as an "end run" around the pragmatic limitations on due process claims already imposed by the Court. In *Meachum v. Fano*, 427 U.S. 215 (1976), and *Sandin v. Conner*, 515 U.S. 472 (1995), the Court recognized that a broad imposition of due process requirements on prison life would inevitably require judges to second-guess a great many operationally driven decisions. And the Court acknowledged in those decisions that such an intrusion would disrupt both prisons and courts, and would create a serious imbalance in the proper separation of executive and judicial power. Accordingly, *Meachum* and *Sandin* articulate strong limitations on prisoner due process claims.

But the decision below revives the problem of excessive judicial intrusion by allowing an alternate basis for challenging the same range of official operational decisions. To obtain judicial review of a decision that would otherwise be left to the informed discretion of corrections officials, all a prisoner need do, according to the court of appeals, is to claim that the decision was made with retaliatory intent. Since most prisoners who would lodge such complaints have lodged other complaints in the past, they can claim retaliation for seeking access to the courts, or, as in this case, an outspoken prisoner can claim that prison officials have retaliated against him for past criticisms that he has leveled against them.

Moreover, the Ninth Circuit's legal standard for retaliation claims is far more prone to abuse than the relatively straightforward due process criteria that themselves "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 515 U.S. at 482. Unlike the due process calculus, which balances objectively verifiable interests (including the States' interest in controlling inmate behavior), retaliation cases turn on murky questions of subjective intent. That gives rise to a "serious problem: because an official's state of mind is easy to allege and hard to disprove, insubstantial claims" are often "less amenable to summary disposition." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998) (internal punctuation omitted). As a result, prisoners can make federal cases out of the most ordinary operational decisions simply by claiming improper motivation.

Inmates have recognized, and exploited, this circumstance by attempting to immunize themselves against adverse administrative actions, claiming that anything unpleasant that happens to them in even remote proximity to

protected conduct is retaliatory. "Retaliation" in such cases becomes a means to "bootstrap a frivolous complaint," *Brown v. Carpenter*, 889 F. Supp. 1028, 1034 (W.D. Tenn. 1995), and a prisoner should not be permitted to "immunize himself from adverse administrative action by prison officials merely by filing a grievance or a lawsuit and then claiming that everything that happens to him is retaliatory." *Id.*

Although the vast majority of such suits are ultimately won by corrections officials, the litigation process itself disrupts prison operations by distracting staff from normal duties and increasing friction within state prisons. A. Champagne & K. Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 Tenn. L.R. 275, 291, Table 6, 293-295 (1975) (a majority of wardens surveyed indicated that prisoner lawsuits distract staff from normal duties and increase tension, and that those problems increase in proportion to the amount of lawsuits); G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation* 5-6, 8 (National Institute of Corrections 1984) (making similar observations).

And prison walls do not limit the adverse affects of that legal manipulation. Every retaliation claim that seeks review of very ordinary, and presumptively valid, administrative decisions must itself be administered by some court somewhere. Each case must also be defended by some government agency. That consumes an inordinate amount of public resources.

Perhaps most galling, the decision below sets the threshold for inmate claims so low that it will result in many cases where there really is no controversy between the parties. Recall that the only injury shown in this case is a threat to transfer inmate Jones to another prison of

comparable security level. Jones suffered no injury other than a subjective "chill" that apparently was not severe enough to prevent him from pursuing this and at least one other case. Neither the threatened action nor the supposed consequences of that threat have any constitutional or practical significance. If that is all it takes for a prisoner to show an actionable injury, the nation's courts will soon be more overcrowded than its prisons. Judges will become functionally indistinguishable from wardens, with both having equal say on even the most mundane operational decisions so long as a prisoner asks the judge to intervene.

This case presents a vehicle to both solve those problems and to provide analytical symmetry in an area of law that federal courts address on a daily basis. That can be accomplished by two decisions from this Court. First, by granting certiorari. Second, by holding that a disputed government action does not inflict sufficient injury to sustain a prisoner retaliation claim unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" for purposes of *Sandin*, 515 U.S. at 484.[1]

---

[1] The amici States' submission differs in two important respects from that of the petitioner, the Idaho corrections director. First, the States believe that the genuine conflict among the Circuits primarily concerns the substantive-law standard of what constitutes "adverse action" in a prisoner retaliation claim. Second, the States urge the Court in part IV of this brief to adopt the *Sandin* standard, which is even more restrictive than the "ordinary firmness" standard advocated by the petitioner.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's prisoner retaliation theory warrants *certiorari* for several interrelated grounds. First, it conflicts with other Circuits' decisions and with decisions of this Court about the extent of injury necessary to satisfy Article III standing requirements. Second, it adds to the inter-Circuit confusion as to what type of injury is sufficient to sustain a prisoner retaliation suit. Third, it highlights an important federal question because existing law in most Circuits erodes the boundaries between the federal courts and state prisons in a way that undermines federalism, the separation of powers and state officials' ability to effectively carry out their exceedingly difficult duties. Fourth, it presents an opportunity to establish a bright-line rule that will remedy all of those ills: that disputed government action will not sustain a prisoner retaliation claim unless that action imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

I. The Court Should Grant Certiorari And Consider What Injury A Prison Inmate Must Show In Order To Claim Standing In A Case Alleging First Amendment Retaliation.

The standing question that Idaho sets forth in the petition is important because prisoner retaliation claims threaten to vitiate the due process doctrine of *Meachum v. Fano* and *Sandin v. Conner*. This case furnishes an excellent example: by citing "retaliatory" threats of transfer, an inmate obtains a court order mandating a system of objective criteria for transfer that the Due Process Clause itself does not require. One of the solutions to this anomalous result lies in

clarifying the standing requirement in prisoner retaliation claims.

Settled law provides two levels of standing: there is the "irreducible constitutional minimum" of elements required for "case-or-controversy" standing under article III, *see Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102-03 (1998), and in addition to the constitutional threshold, the Court has articulated "a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982); *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). Both constitutional and prudential standing requirements are "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett*, 520 U.S. at 162 (internal citation omitted).

The Ninth Circuit's "chill" doctrine cannot be reconciled with the Court's precedents. In the prison context the Court has emphasized that the "actual injury" requirement for standing "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Careful definition of both the scope of constitutional rights and the range of cognizable injuries is particularly important in the area of prisoner litigation because "federal courts do not sit to supervise state prisons," *Meachum v. Fano*, 427 U.S. 215, 229 (1976), and because state officers should remain "primary arbiters of the problems that arise in prison management." *Shaw v. Murphy*, 121 S.Ct. 1475, 1480 (2001). And the cert. petition correctly notes that the Court has specifically rejected mere "chill" as qualifying for "actual injury" that would meet the constitutional threshold. *See Laird v. Tatum*, 408 U.S. 1 (1972).

Perhaps one source of the Ninth Circuit's error lies in the existence of a genuine "chill" doctrine that applies to some First Amendment cases. The States acknowledge that when a plaintiff challenges a state law as "overbroad" under the First Amendment, that plaintiff can avoid the usual prudential limitations on standing and seek to void the law even if the injury in her own case does not manifest the First Amendment evil, and even though her own conduct could constitutionally be proscribed under a more narrowly drafted law. *See e.g., Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) (a "litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court"); *cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (distinguishing facial challenge by plaintiff to whom the statute, but for overbreadth, could validly be applied, from a challenge predicated on unconstitutional application of a statute to the plaintiff).

But that "chill" doctrine in no way applies here. This case involves particular prisoners (the cert. petition focuses on plaintiff Bob Jones) complaining of specific official conduct. The district court rejected class relief, and specifically found that "acts of retaliation were isolated instances over a period of many years and did not pervade the entire class." District Court Order, at 35; Pet. App. 76-77. Therefore no law or even administrative practice forms the basis for a "facial" challenge here. And in any event, a plaintiff such as Bob Jones cannot invoke the genuine "chill" doctrine, because he was afforded relief based upon the specialized findings in his case – in other words, official authority in the opinion of the lower courts was exercised wrongfully in an "as applied" manner to Jones. *See Brockett, supra.*

Far from properly triggering a First Amendment "chill" doctrine, the case of prisoner Bob Jones presents an occasion for applying a diametrically opposed rule. By contrast with the loosened standard that applies in "overbreadth" cases, *Lewis v. Casey*, *supra*, closely tied the scope of the prisoner's constitutional right to the injury that qualifies the prisoner to sue: "The foregoing [actual injury] analysis would not be pertinent here if ... the right at issue – the right to which the actual or threatened harm must pertain – were the right to a law library or to legal assistance. But *Bounds* [*v. Smith*, 430 U.S. 817 (1977)] established no such right, anymore than *Estelle* [*v. Gamble*, 429 U.S. 97 (1976)] established a right to a prison hospital." *Lewis*, 518 U.S. at 350. In other words: since the prisoner's constitutional right was limited to a right to access the courts (and did not include a freestanding right to a prison library), the prisoner had to show an injury that actually involved an inability to access the courts. It was not enough to show that there was no prison library.

By parity of logic, the injury discussion in this case "would not be pertinent" if, as the inmates seem to assume and the Ninth Circuit seemed to agree, a prisoner has a right to always be free of any change (or threat of change) in the circumstances of confinement, to the extent that the change stems from the prisoner's exercise of expressive rights. Such a broad definition of First Amendment rights in the prison context cannot be reconciled with the basic premises of prison life, under which the state takes custody over the prisoner as a punishment for her offenses.

Further confirmation of the incongruity of the Ninth Circuit's injury-free standing rule comes from the jurisprudence acknowledging the contextual character of First Amendment protections. Two Circuits, the Sixth and the Second, explicitly subscribe to the sensible doctrine that

"[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before a [retaliatory] action taken against them is considered adverse." *Dawes v. Walker*, 239 F.3d 489, 493 (2nd Cir. 2001), citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999). This logic accords with the Court's pronouncement in Eighth Amendment cases that "[t]o the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

Additionally, the two detriments identified by the Ninth Circuit in this case – prison transfer and Jones's resignation from a prison-library law-clerk position – in no way qualify as events triggering heavy constitutional scrutiny under these circumstances. Prison transfers – even where they impose some detriments on prisoners (a showing absent in the present case) – implicate no liberty interest cognizable under the Due Process Clause. *Hewitt v. Helms*, 459 U.S. 460, 467 n.4 (1983); *Meachum, supra; Sandin, supra.* And loss of public employment (assuming the law clerk position here qualified for that status) does not, in the absence of state law protection through tenure or civil service classification, trigger due process scrutiny even for a free public employee, let alone a prisoner. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

The Ninth Circuit's anomalous "chill" doctrine permits the prisoner to limit the power of prison officials to exercise custodial control based merely on the assertion that specific official acts potentially affect the inmate's exercise of expressive freedoms. That sort of reasoning has met with disapproval by this Court both within and outside the prison context. *See, Sandin, supra,* 515 U.S. at 484 (rejecting assertion by prisoner that "any state action taken for a

punitive reason encroaches upon a liberty interest under the Due Process Clause"); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (public employee should not be "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing").

Thus, in the wake of the *Lewis v. Casey* analysis, the precise contours of the residual First Amendment right enjoyed by Bob Jones as a prisoner of the state bears on whether Jones has shown a sufficient injury for standing purposes. No such First Amendment injury is present here.

II. Certiorari Should Be Granted To Resolve The Substantive-Law Conflict Among Circuits Over What A Prisoner Must Show To Establish "Adverse Action" In The Context Of A First Amendment Retaliation Claim.

While the Circuits (broadly speaking) agree that a plaintiff claiming First Amendment retaliation must show "adverse action" that has a retaliatory motive, the appellate courts are split over what a prisoner must show to establish "adverse action." The practical problems posed by prisoner retaliation claims are aggravated by this lack of consensus on the extent of injury necessary to sustain them. Four different standards prevail and only this Court can tell the States which of them, if any, is the law. (In part IV below, the amici States support a heightened standard in prisoner cases.)

The first view holds that "when retaliatory conduct is involved, there is no independent injury requirement." *Dixon v. Brown*, 38 F.3d 379, 380 (8th Cir. 1994). The second, very closely related approach followed by the court below, is

that nothing more than a subjective chilling of expressive conduct is needed. Pet. App. 15.

The third is an objective standard, based on whether the disputed action "would deter a person of ordinary firmness from the exercise of the right at stake." *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999)(quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000); *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996) *rev'd on other gr'nds*, 523 U.S. 574 (1998).

Finally, the Fourth and Fifth Circuits require a showing of adverse impact upon the exercise of protected conduct. *ACLU of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993); *Johnson v. Rodriquez*, 110 F.3d 299, 314 (5th Cir. 1997).

In short, federal law is currently fragmented on this question. The States ask this Court to articulate a single, national standard in this case.

III. The Question Presented Is Important Because Prisoners' Use Of Retaliation Theory To Circumvent The Sensible Limitations Imposed By *Meachum v. Fano* And *Sandin v. Conner* Results In Undue Federal Intrusion Into Core State Functions, Undermines The Separation Of Powers, And Complicates Penal Administration.

The States need a definitive ruling because most of the standards applied perpetuate the same problems that *Meachum* and *Sandin* tried to stop—excessive federal

involvement in state prison operations, blurred distinctions between judicial and executive functions, and the resulting disruption of penal operations. The injury–free, subjective–chill and even the more objective "person of ordinary firmness" standard have resulted in lawsuits challenging actions quite properly left to the informed discretion of corrections professionals under *Meachum* and *Sandin*.

A. Federalism Concerns.

It cannot be gainsaid that the management of state prisons is a core state function. "The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States," *Kelly v. Robinson*, 479 U.S. 36, 47 (1986), and the management of "penal institutions is an essential part of that task." *Procunier v. Martinez*, 416 U.S. 396, 412 (1974). Indeed, "it is difficult to imagine an activity in which a State has a stronger interest." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973). That respect for State autonomy was at the heart of *Meachum*, which recognized that "[t]he federal courts do not sit to supervise state prisons, *the administration of which is of acute interest to the States*." 427 U.S. at 229 (emphasis added).

Most of the adversity standards applied to prisoner retaliation claims undermine the sovereignty *Meachum* and *Sandin* sought to preserve by providing non-existent, or unpredictable, criteria for subjecting presumptively lawful State decisions to federal review. The injury-free and subjective-chill standards prevailing in the Eighth and Ninth Circuits provide no check on federal review of state penal matters. The "person of ordinary firmness" standard controlling in the Second, Third, Sixth and District of Columbia Circuits, while somewhat of an improvement, is really not much of a standard at all, allowing individual

federal judges to determine which administrative decisions would or would not affect the hypothetical prisoner "of ordinary firmness." And tellingly, it too has led to federal scrutiny of state decisions that *Meachum* and *Sandin* indicate are mundane enough to be within the scope of a prisoner's lawfully imposed sentence. *See, e.g., Hall v. Sutton,* 755 F.2d 786, 787 (11th Cir. 1985) (allegedly retaliatory confiscation of tennis shoes, though not cognizable as due process claim, could proceed as retaliation claim.)

B. Separation of Powers.

It is similarly beyond dispute that day-to-day prison operations are consigned to the executive, not the judiciary. "[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell v. Wolfish,* 441 U.S. 520, 548 (1979).

The injury-free and subjective-chill standards confuse, if not merge, the executive function of prison administrators and the traditional duties of judges. Because no significant threshold is set, any administrative decision, no matter how trivial, can become the subject of a retaliation case merely because a felon alleges improper motivation. Courts presiding over prisoner retaliation suits "inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem [put at issue], thereby 'unnecessarily perpetuat[ing] [federal] involvement . . . in [the] affairs of prison administration,'" *Turner v. Safley,* 482 U.S. 78, 89 (1987) (quoting *Procunier,* 416 U.S. at 407). Those approaches improperly place the courts "astride the day-to-day functioning of state prisons and

involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum*, 427 U.S. at 228-29.

The same is true of the more objective, but still inherently uncertain, "person of ordinary firmness" standard applied in the Second, Third, Sixth and District of Columbia Circuits. As discussed above, they routinely result in judicial review of administrative decisions that this Court has sensibly consigned to executive branch personnel. Instead of leaving such matters in the hands of officials possessing the "flexibility [] specially warranted in the fine-tuning of the ordinary incidents of prison life," *Sandin*, 515 U.S. at 483, that approach has resulted in such decisions being reevaluated through a system that is far more rigid and detached from the realities that give rise to prisoner cases.

C. Impact on Prison Management.

Those deviations from constitutional principles have real world impact. It must be remembered that the task of properly running their prisons is, among "the most vexing of all state responsibilities." *Id.* at 137 (Burger, C.J., concurring). Retaliation suits add to that burden "[b]ecause an official's state of mind is easy to allege and hard to disprove" and, no matter how insubstantial the underlying dispute, they are "less amenable to summary disposition []" *Crawford-El*, 523 U.S. at 584-585.

As the National Institute of Corrections has noted, "[c]ases that survive summary judgment often require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial... and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is

disproportionate to the amounts involved." G. Cole, R. Hanson, and J. Gilbert, *supra*, at 5-6. Other staff members have to spend time retrieving, organizing and often redacting documents. And as the case moves to trial, additional sets of employees are diverted from institutional duties to transport prisoner-plaintiffs and inmate witnesses to and from court.

But the disruption is not limited to the diversion of staff members. It has far more serious consequences for the maintenance of order within the volatile prison environment:

> Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.
>
> * * *
>
> An institution whose prisoners have *successfully* sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems. The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems.

G. Cole, R. Hanson, and J. Gilbert, *supra*, at 5-6, 8.

Prison officials already face "Herculean obstacles" in dealing with the "complex and intractable"

problems of prison administration. *Procunier*, 416 U.S. at 404. Prisoners should certainly have redress for wrongful official action, but there must be some common-sense limits. The injury standards utilized by most Circuits impose few. The consequences warrant this Court's attention.

IV. This Court Should Adopt A Bright-Line Rule Based On *Sandin v. Conner.*

All of those problems can be addressed by the adoption of a clear standard that is rooted in this Court's prior decisions -- a holding that disputed government action does not inflict sufficient injury to sustain a prisoner retaliation claim unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" for purposes of *Sandin*, 515 U.S. at 484. As would be developed more fully through their brief on the merits, the amici States submit that this result is strongly supported by three lines of analysis.

First, this Court has consistently recognized that special institutional needs justify differing treatment of the right underlying the claim at issue here, the First Amendment right of expressive conduct. The special needs of government agencies require that speech rights be defined differently in the public employment context from those enjoyed by the public at large outside that context. *See Waters v. Churchill*, 511 U.S. 661 (1994). The unique mission of, and demands upon, the military have resulted in limitation of Free Exercise rights in the context of military service. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Finally, Fourth Amendment privacy and security interests balance differently when special needs justify intrusive government action. *Vernonia School Dist. 47J v. Acton*, 575 U.S. 646, 665 (1995); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S.

602, 620 (1989); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

This Court has repeatedly recognized the uniqueness of the prison environment and the resulting need to adjust the normal scope of First Amendment rights. The special demands of that environment equal or exceed those giving rise to the special rules just discussed. Hence this Court would not be breaking new ground in creating a specially crafted rule for prisoner retaliation cases. Indeed, it has already done so. See *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (access to courts); *Price v. Johnson*, 334 U.S. 266, 285 (1948) (same); *Jones v. North Carolina Prisoners' Labor Union, Inc*, 433 U.S. 119, 125-26, 128 (1972) (association).

Second, the rule the amici States suggest is itself well crafted to address the problems discussed in the previous section. Although *Sandin*'s "atypical and significant hardship" test admittedly was not crafted for retaliation claims, it, like *Meachum* before it, was informed by the same federalism, separation of powers and practical considerations. 515 U.S. at 482-83; *Meachum*, 427 U.S. at 229.

Third, the *Sandin* standard would add symmetry to this area of law that is a staple of federal practice. Although their rapid growth has been checked by the Prison Litigation Reform Act, P.L. No. 104-134, 110 Stat. 1321, 1366 (Apr. 26, 1996), prisoner claims still make up a significant portion of the federal docket. Establishing a uniform threshold for federal review of penal decisions would not only simplify the evaluation of often-cryptic *pro se* pleadings, but would also add internal logic for determining which state decisions have sufficient import to warrant federal scrutiny.

CONCLUSION

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

DAVID M. GORMLEY
State Solicitor
ROBERT C. MAIER*
TODD R. MARTI
Assistant Solicitors
**Counsel of Record*

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